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ALLOCATION OF PRIVATE PENSION BENEFITS
AS PROPERTY IN ILLINOIS DIVORCE PROCEEDINGS

Peter Bonavich *

In this article, Professor Bonavich argues that private retirement plan benefits should be characterized as property under the Illinois Marriage and Dissolution of Marriage Act for purposes of division upon divorce. In so doing, he examines the provisions of the Employee Retirement Income Security Act (ERISA) and pertinent Illinois case law.

The recently enacted Illinois Marriage and Dissolution of Marriage Act (IMDMA) 1 raises a number of questions regarding property disposition. One of the most troublesome involves the particular interests that are to be treated as marital property. The statute defines “marital property” as “all property acquired by either spouse subsequent to the marriage,” 2 but it creates an exception for certain classes of property designated as “non-marital property” based on either their nature or time of their acquisition. 3 It does not, however, define “property,” or explain how a court is to decide whether property was “acquired” during the marriage.

The purpose of this article is to explore the circumstances under which Illinois courts may find that private pension benefits are marital property subject to division in marriage dissolution proceedings. The methods that are available to accomplish the identification, valuation, and allocation of plan benefits as marital property are analyzed. Finally, the problem of federal preemption of state law is discussed.

The following questions are relevant to this analysis: (1) Which interests in private pension benefits qualify for treatment as property? (2) When may

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2. Id. § 503(a).
3. The following are classified as “non-marital property”:
   (1) property acquired by gift, bequest, devise or descent;
   (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;
   (3) property acquired by a spouse after a judgment of legal separation;
   (4) property excluded by valid agreement of the parties;
   (5) the increase in value of property acquired before the marriage; and
   (6) property acquired before the marriage.

Id. § 503(a)(1)-(6).
Private Pension and Retirement Plans

Purposes and Types of Plans

Valuable to both employer and employee, retirement programs were created for a variety of reasons. For the employer, some type of plan is desirable to attract, retain, and motivate employees.\(^4\) If the plan qualifies for favorable tax treatment, other advantages include the deductibility of employer contributions and, in the case of a plan funded through a proper trust or custodial account, a tax exemption accorded to income from trust assets.\(^5\) For the employee, a retirement plan provides security for later years, a convenient savings method, postponement of taxation on some or all contributions and the income from them until final disbursement, and certain tax concessions even after disbursement.\(^6\)

Plans are classified in a number of ways. The source of contributions to plan funds will determine whether it is termed non-contributory (no contributions from employees) or contributory (employees may or must contribute).\(^7\) The manner in which contributions are credited and the manner in which benefits are determined further delineate certain types of programs. Two broad types are identified: the defined contribution (or individual account) plan\(^8\) and the defined benefit plan.\(^9\) The former provides for the

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5. See I.R.C. §§ 404, 501(a), (c). See also Pattiz, In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans, 5 Pepperdine L. Rev. 191, 202 n.39 (1978) [hereinafter cited as Pattiz].
6. Id.
7. See generally J. Mamorsky, Pension and Profit-Sharing Plans: A Basic Guide 1-37 (1977) [hereinafter cited as Mamorsky]. There are some differences among types of plans, especially among defined contribution plans, that may have importance in specific factual situations. Throughout this article, the term "retirement plans" embraces all pension and profit-sharing plans, including both defined benefit and defined contribution plans. The term "defined contribution plan" will include all plans that employ individual accounts for participants.
   The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.
9. Id. § 1002(35).
maintenance of individual employee accounts to which contributions are made according to formulas established by the plan. The salient features of this type of program are the calculation of allocations to individual accounts according to a plan formula and the use of individual employee accounts. If the formula for employer contributions conditions those contributions on the existence of profits, the plan is termed a profit-sharing plan. If the contribution is fixed without reference to profits, the program is termed either a money-purchase plan or a target-benefit plan. Benefits ultimately paid in defined contribution or individual account plans depend on the periodic allocations made to individual accounts and the income experience of the plan funds.

Alternatively, a defined benefit plan employs a formula to compute the benefit that will accrue to employees. Contributions are then made in an amount that actuaries calculate will yield the promised benefits. The benefits payable are usually based on years of service, some measure of average compensation, or both. Defined benefit plan contributions, like those made under a money-purchase plan, are not dependent on profits. In this type of program the benefit is stated; it is the contributions that must be determined by the administrators, and contributions are the amounts actuarially determined as necessary to fund the promised benefit. In a defined contribution plan, the contributions are fixed by the plan, but the amount of benefits remains unknown. Of course, employers may maintain more than one type of program.

IMDMA and Retirement Plans

Pension and retirement plans are economically significant. The volume of assets held for the purpose of guaranteeing retirement income has increased.

The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant—

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

10. Id. See ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION (IICLE), PENSION PRACTICE ¶ 3.10, at 3-7 (1978) [hereinafter cited as IICLE PENSION PRACTICE].
12. See [1977] PENS. & PROFIT-SHARING (P-H) ¶ 5104. See also IICLE PENSION PRACTICE, supra note 10, ¶ 3.21, at 3-11, 3-12.
14. Mamorsky, supra note 7, at 6-10.
16. Id. See also [1977] PENS. & PROFIT-SHARING (P-H) ¶ 5104.
17. See I.R.C. § 410 (limitations on plan combinations).
dramatically in the last thirty years. Non-insured private pension and retirement plans in 1975 boasted $145 billion in assets. In that same year, thirty million workers were covered by retirement plans. (In 1950, private plans held about $12 billion in assets and covered about ten million workers.) For many families, the right to receive retirement benefits may constitute the principal, if not the only, substantial family asset.

Pension and retirement plans create in employees interests that vary greatly in certainty of realization and in amount of control given to the employee. Nonetheless, it is submitted that this range of interests sweeps into its scope some interests that deserve the label “property.”

If it is determined that pension plans create property and that an employee’s interest has been acquired during the marriage, the court in a proceeding under IMDMA must determine how a just division of this property is to be accomplished. IMDMA contains a number of provisions that are relevant to these problems. The Act broadens the category of property for which record title is not controlling by creating a broad category of “marital property” that is subject to division regardless of how title is held. Further, by mandating a “just” division of marital property, the Act imposes restraints upon judicial discretion in property division. In making this division, the court is required to consider “all relevant factors,” including ten that are enumerated.

19. Id.
22. See notes 78-101 and accompanying text infra. Retirement plans commonly include “ancillary” benefits, which are principally disability and death benefits.
24. Id. § 503(c).
25. Id. These factors are:

1. the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit;
2. the value of the property set apart to each spouse;
3. the duration of the marriage;
4. the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;
5. any obligations and rights arising from a prior marriage of either party;
6. any antenuptial agreement of the parties;
7. the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;
8. the custodial provisions for any children;
9. whether the apportionment is in lieu of or in addition to maintenance; and
10. the reasonable opportunity of each spouse for future acquisition of capital assets and income.
Further, following the structure of the Uniform Marriage and Divorce Act (UMDA), from which it is largely derived, IMDMA erects a two-stage test for the award of maintenance (formerly alimony), which appears designed to constrict the court's discretion in making such awards. The court is permitted to enter a maintenance order only if it finds that a spouse satisfies certain need-oriented criteria. If that crucial threshold test is passed, the amount and duration of the award is then left to judicial discretion that is to be guided by traditional alimony standards. Worthy of note is IMDMA's mandate that a just division of marital property take into consideration whether the award is "in lieu of or in addition to maintenance."

Finally, IMDMA permits the court to provide for minor, dependent, or incompetent children of a dissolving marriage by "setting aside a portion of the jointly or separately held estates of the parties in a separate fund or trust." The difficulty of satisfying IMDMA's maintenance criteria, coupled with the comparative flexibility of the criteria for division of marital property, will induce many spouses to seek a share of pension benefits as

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27. ILL. REV. STAT. ch. 40, § 504(a) (1977):

[T]he court may grant a maintenance order for either spouse, only if it finds that the spouse seeking maintenance:

1. lacks sufficient property, including marital property apportioned to him, to provide for his [or her] reasonable needs, and
2. is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home, or
3. is otherwise without sufficient income.

28. Id.

29. Id. § 504(b):

The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, after consideration of all relevant factors, including:

1. the financial resources of the party seeking maintenance, including marital property apportioned to him and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
2. the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
3. the standard of living established during the marriage;
4. the duration of the marriage;
5. the age and the physical and emotional condition of both parties; and
6. the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

30. Id. § 503(c)(9).

31. Id. § 503(d).
part of a property division rather than as funds available for maintenance. Moreover, vigorous protection of children's interests frequently will include an attempt to reach pension benefits as part of the "estates of parties."\textsuperscript{32}

The determination of whether plan interests are property must turn in large measure on a close examination of the precise interest held in a retirement plan, and on the court's position as to the legal status of the particular plan. This inquiry necessarily involves a close scrutiny of the actual terms of the plan. Those terms in turn are pervasively influenced today by the Employees' Retirement Income Security Act of 1974 (ERISA).\textsuperscript{33}

**ERISA and Property**

The specific interests arising from retirement plan terms have been largely created by ERISA.\textsuperscript{34} ERISA is silent as to whether plan interests constitute "property." It seems certain, however, that some or all of the interests created by plans complying with ERISA should be regarded as property for purposes of marriage dissolution proceedings.\textsuperscript{35}

Several salient features of ERISA deserve brief summary here. ERISA imposes minimum standards for vesting of "accrued benefits"\textsuperscript{36} in the private pension plans covered by its regulatory provisions.\textsuperscript{37} Further, in order to qualify for favorable tax treatment, plans also must comply with ERISA tax qualification provisions, which are essentially identical with those applicable to plans covered by the regulatory provisions.\textsuperscript{38}

\begin{itemize}
  \item \textsuperscript{32} See \textit{id.} § 506 (permitting the court to appoint an attorney for a minor or dependent child).
  \item \textsuperscript{33} 29 U.S.C. §§ 1001-1381 (1976). With some exceptions, the regulatory provisions of ERISA cover private pension plans ("employee benefit plans") that are established or maintained: "(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both." \textit{id.} § 1003(a).
  \item ERISA's regulatory provisions do not apply to a plan if it is a governmental plan as defined by \textit{id.} § 1002(32); a church plan as defined by \textit{id.} § 1002(33); a plan maintained solely to comply with Workmen's Compensation, unemployment compensation, or disability insurance laws; a plan maintained outside the United States primarily for nonresident aliens; or an excess benefit plan, as defined by \textit{id.} § 1002(36). \textit{See id.} § 1003(b).
  \item See notes 36-46 and accompanying text \textit{infra}.
  \item The term "accrued benefit" is defined:
    \begin{itemize}
      \item \textit{A} in the case of a defined benefit plan, [as] the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or
      \item \textit{B} in the case of a plan which is an individual account plan, [as] the balance of the individual's account.
    \end{itemize}
  \item \textsuperscript{37} \textit{See note 33 supra}.
  \item \textsuperscript{38} \textit{See note 34 supra}.
\end{itemize}
One of ERISA's most important innovations is the requirement that specified percentages of contributions and benefits that have "accrued" during employment become—except under a limited set of circumstances—"vested" or "nonforfeitable" prior to retirement. Under pre-ERISA law, it was possible for a plan to postpone until retirement the vesting of the employee's right eventually to receive a benefit derived from employer contributions. Thus, it was possible for a retirement plan to make the "vesting" requirement (certain eventual payment) identical with the maturity requirement (immediate entitlement). Vesting and maturity therefore coincided in time, both occurring only when the employee reached retirement.

Under ERISA, vesting is distinguished from maturity. Employee contributions must be 100% vested as they are made, while employer contributions must vest according to one of three minimum schedules. ERISA also requires that, for defined benefit plans, plan benefits must "accrue" or be earned at a rate that satisfies specified criteria. The overall impact of these requirements is to guarantee that after even relatively short periods of employment, many covered employees will be "entitled" to the eventual receipt of benefits. Those benefits will not necessarily, however, be mature. Their payment is certain but need not be immediate.

40. [1979] PENS. PLAN GUIDE (CCH) ¶ 3000. In enacting ERISA, Congress found that "despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans . . . ."
41. [1979] PENS. PLAN GUIDE (CCH) ¶ 3000.
44. 29 U.S.C. § 1054 (1976); I.R.C. § 411(b).
45. ERISA does not render vested (used in ERISA synonymously with "nonforfeitable") benefits wholly immune from forfeiture. The term "nonforfeitable" refers to a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3). . . .
In sum, ERISA distinguished certainty of payment from immediacy of payment. This Act also requires plans to specify a rate of accrual of benefits that may be called "earning" benefits. There are three categories of interests to be considered: (1) benefits that are earned (accrued) but neither vested nor mature; (2) benefits that are earned and vested but not mature; and (3) benefits that are earned, vested, and mature. To gain a perspective on the changes wrought by ERISA, and to develop an understanding of the case law doctrines that are relevant to identification of interests in ERISA plans as property, the evolution of Illinois case law addressing the status of plans and their benefits will be examined.

Pension Plans in Illinois Outside of Divorce Context

Illinois cases dealing with retirement plan rights outside the divorce context have involved employer-employee disputes over the employee's right to receive benefit payments or the return of contributions. (All decisions construed pre-ERISA plans.) They uniformly have turned on a close construction of and strict adherence to the terms of the document setting up the retirement plan.

In Umshler v. Umshler, the plan provided for sole discretion in the employer to terminate the employee's right to receive a pension. Under those circumstances, the court held, the plan was a mere gratuity and conferred no enforceable right on the employee that could be asserted by a spouse in an action for sequestration. The United States District Court for the Northern District of Illinois, in Hurd v. Illinois Bell Telephone Co., applying Illinois law, construed a plan that by its terms guaranteed the payment of a pension to all employees who satisfied certain eligibility requirements. This program, according to the court, was a unilateral contract. Under its terms, an employee could obtain a legally enforceable right to the pension only by satisfying all the terms and conditions im-

46. For the definition of "accrued benefit," see note 36 supra.
47. 332 Ill. App. 494, 76 N.E.2d 231 (1st Dist. 1947). In Umshler, the plaintiff sued her husband for separate maintenance and sued his former employer, the Illinois Central Railroad, to sequester certain pension benefits. Id. at 495, 76 N.E.2d at 231. Because the dispute was solely with the employer, the case is treated as being outside the context of a divorce dispute. The court held: "In our opinion the benefits provided for in the pension plan of defendant railroad company are clearly gratuities." Id. at 498, 76 N.E.2d at 233. See Hughes v. Encyclopedia Britannica, 1 Ill. App. 2d 514, 117 N.E.2d 880 (1st Dist. 1947) (non-contributory pension plan did not give rise to an enforceable unilateral contract).
48. 332 Ill. App. at 498, 76 N.E.2d at 233.
49. 136 F. Supp. 125 (N.D. Ill. 1955), aff'd, 234 F.2d 942 (7th Cir. 1956). Here, employees brought a class action to test Illinois Bell's practice of offsetting federal old age insurance benefits against company pensions.
50. See 136 F. Supp. at 129.
51. Id. at 134. The court stated: "The instrument upon which the litigation turns is, as both parties admit, a unilateral contract to pay a pension . . . ."
posed. In *Anderson v. Seaton*, the Illinois Appellate Court for the First District approved and followed the reasoning of *Hurd*, which had involved the same plan. The *Umshler, Hurd, and Anderson* cases involved pension plans that were non-contributory and that postponed vesting until maturity. In other words, the plans provided that the employee did not contribute to the plan directly from his or her earnings and enjoyed no certainty (provided by vesting) of receiving any benefits until the benefits were immediately payable (matured). Maturity and vesting, in the *Hurd* and *Anderson* cases, both occurred at retirement. Because the time of vesting coincided with the time of maturity, it is not surprising that the courts in those cases viewed no right as having "vested" in the employee until he or she had retired and satisfied all the requirements imposed by the plan for the payment of benefits. By the same token, there was no occasion for the courts to decide whether the certainty of eventual payment (vesting) alone could operate to convert the plan to something more than a gratuity or an incompletely accepted offer to form a unilateral contract.

Today, the atmosphere in which pension plans are construed is more hospitable to an employee's claim of entitlement. There is a discernible trend to treat employees' "rights" somewhat more generously. The charac-

52. *Id.* at 155.
53. 14 Ill. App. 2d 53, 143 N.E.2d 59 (1st Dist. 1957). In this case, the plaintiffs, retired Illinois Bell employees, sought to have their pension benefits restored to them.
54. *Id.* at 59, 143 N.E.2d at 62. In so holding, the court affirmed the dismissal of the plaintiff's complaint.
55. In fact, the Illinois Central plan involved in *Umshler* provided no certainty of payment at all even when the interest was "mature." See 332 Ill. App. at 494, 76 N.E.2d at 233.
56. *E.g.*, Craig v. Bemis Co., 517 F.2d 677 (5th Cir. 1975). In this pre-ERISA case, former employees of the defendant, who were terminated when the employer closed its plant, brought an action to recover pension benefits pursuant to employer's retirement plan or under a theory of quantum meruit. Where there was no evidence that the closing had been in bad faith and where the plaintiffs' rights under the plan had not vested, their claims were denied. The court, however, did recognize that non-contributory pension plans no longer are considered gratuities. It held: "Although private, non-contributory pension plans were once viewed as gratuities...it is now generally true that both employers and employees regard pension benefits as a type of deferred compensation." *Id.* at 680 (citation omitted). See *Genevese v. Martin-Marietta Corp.*, 312 F. Supp. 1186 (E.D. Pa. 1969). Here, plaintiffs sought return of their pension contributions under an amended plan covering salaried employees after they joined a union and became hourly employees. The court denied their claims because it found the amendment to the plan to be valid. Further, it held that the construction of a plan depends upon the analysis of its terms, with possibilities ranging from a gratuity to a unilateral contract to a bilateral contract. *Id.* at 1190. See also *In re Marriage of Brown*, 15 Cal. 3d 898, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (pension benefits are a form of deferred compensation); *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1st Dist. 1979) (non-vested or profit-sharing interests found to be bargained-for contractual rights to deferred compensation and therefore property); *Musser v. Musser*, 70 Ill. App. 3d 706, 388 N.E.2d 1289 (4th Dist. 1979) (military pension pay is earned property right accruing from years of service). *But see* Lehner v. Crane Co., 448 F. Supp. 1127 (E.D. Pa. 1978) (Illinois law applied to construe plan narrowly as a unilateral contract).
terization of the employee’s interest in benefits as a gratuity is giving way to a recognition that pension plans are more accurately seen as interests flowing from contracts that provide benefits as deferred compensation for services performed by the employee. The terms of the plan are still viewed as controlling on the question of entitlement to the benefits. For that reason, the Hurd and Anderson discussion of plans as unilateral contracts still may be persuasive in a particular factual context, although recent Illinois decisions have not relied on either the gratuity or the unilateral contract rationale. The emerging view is that plan benefits are deferred compensation, and that the employee’s entitlement to them is to be determined by the terms of the plan document. Two recently decided Illinois cases illustrate the importance of the specific provisions of the plan.

In Stevenson v. I.I.T.-Harper, Inc., the Illinois Appellate Court for the First District refused to require the payment of pension benefits from a plan because the plaintiff-employee had not complied with the program’s eligibility requirement—he had not retired nor had he reached age sixty-five. The plan was not subject to ERISA requirements, and thus provided for no vesting prior to maturity. Following the terms of the plan, relief was denied. The court declined to characterize the plan or its benefits as a gratuity, unilateral contract, or property, but rather construed it as a contract fixing the respective rights of the parties.

To the contrary, in Anger v. Bender, the earlier Illinois Appellate Court for the First District refused to permit a plan administrator to deny, because of disloyalty to the employer, payment of benefits to a former employee. The plan, which also was not subject to ERISA requirements, stated that its


58. See Stevenson v. I.I.T.-Harper, Inc., 51 Ill. App. 3d 568, 366 N.E.2d 561 (1st Dist. 1977) (plaintiff, fired as president of defendant corporation, brought suit for damages alleging that his pension plan was deferred compensation; court arguably construed the plan as a unilateral contract, but no express language to that effect); Anger v. Bender, 31 Ill. App. 3d 877, 335 N.E.2d 122 (1st Dist. 1975) (court upheld defendant’s right to pension benefits despite his being engaged in selling of trade secrets, which, had he been discovered, would have given employer cause to divest him of those benefits).


60. 51 Ill. App. 3d 568, 366 N.E.2d 561 (1st Dist. 1977).
61. Id. at 572, 574, 366 N.E.2d at 565, 566.
62. Id. at 571-72, 366 N.E.2d at 566-67.
63. 31 Ill. App. 3d 877, 335 N.E.2d 122 (1st Dist. 1975).
purpose was “to reward eligible employees for their loyal and faithful service. . . .” The employer contended that this provision could be the basis for “divestment” of benefits. The court refused to view the clause as authorizing the employer to divest the employee of benefits except according to the specific terms of the plan, and stated additionally: “Even if the above statement or purpose involved an issue of interpretation, pension plans are to be liberally construed in favor of the employee.”

In addition to Anger’s liberal rule of construction, the cases are significant for two reasons. First, neither characterized as either a gratuity or an incomplete unilateral contract a retirement plan that provides for the vesting of contributions under specified conditions. Indeed, the Anger court eschewed any such facile characterization. In Anger, the court cited Hurd (unilateral contract) only for the proposition that the provisions of each particular plan are controlling. Moreover, a federal district court case, Genevese v. Martin-Marietta Corp., was cited with approval in Anger. The citation is significant; Genevese clearly embraces the view that the characterization of retirement plan rights depends on the specific terms and provisions of the plan, and possible characterizations range from “gratuity” to “bilateral contract,” depending on the specific terms involved. Although after ERISA the “gratuity” characterization of plans seems untenable in any event, the shift from Stevenson to Anger confirms the breadth if not the fundamental evolution of the Illinois view of private retirement plan interests.

ERISA has introduced important changes in private plan terms. All plans covered by that Act, as noted, must specify a formula for the accrual of benefits, and accrued benefits must vest in compliance with one of ERISA’s vesting schedules. Compliance with ERISA means that in most cases accrual, vesting, maturity, and retirement will not coincide in time. For example, an employee hired at age thirty, whose non-contributory deferred benefit plan provides for 100% vesting after ten years of employment, at age forty has a virtually certain, “vested” entitlement to eventual disbursement of his or her accrued benefits upon reaching retirement age. Yet, the employee may have no immediate (“mature”) entitlement to anything, even

64. *Id.* at 880, 335 N.E.2d at 125.
65. *Id.*
66. “Defendant’s rights under the pension trust and profit-sharing plans should be determined in accord with the provisions of each particular plan.” *Id.*
67. 31 Ill. App. 3d at 880, 335 N.E.2d at 125.
69. 31 Ill. App. 3d at 880, 335 N.E.2d at 125. It is cited for the proposition that the plan terms are controlling. *Id.*
70. 312 F. Supp. at 1190.
71. See notes 36-38 and accompanying text *supra*.
if he or she resigns or is terminated. This vested but deferred benefit is a much more certain interest than the illusory benefit conferred by the Urnshler plan or the highly conditional benefit of the Hurd-Seaton plans. Moreover, the funding and accrual requirements of ERISA have resulted in covered plans bearing little or no resemblance to the Urnshler or Hurd-Seaton plans. Post-ERISA plans must comply with strict funding requirements, and ERISA imposes strong fiduciary obligations on plan administrators. These far-reaching changes generally make the Urnshler, Hurd, Seaton, and Stevenson results presently inapplicable. Plan provisions, however, continue to enjoy controlling importance, and the court's willingness in an appropriate case to regard plan interests as an enforceable entitlement will always be a significant outcome determinant.

**PLAN INTERESTS AS PROPERTY**

To what extent do benefits—mature, vested, or merely accrued—comport with the Illinois view of "property?" If post-ERISA plans create employee interests that no longer can be regarded as merely gratuities, which, if any, plan interests may be regarded as property—marital or nonmarital—under IMDMA?

As an employee moves from his or her initial hiring through year after year of employment to death, retirement, resignation, or firing, his or her interest in an ERISA-covered pension plan changes. At any given point along the time axis, the employee's rights under the plan may be described. A plan complying with ERISA will provide that the employee's rights evolve in terms of three variables: accrual or "earnedness" of benefits, certainty or nonforfeitability ("vesting") of benefits, and immediate availability or pay status (maturity) of benefits. Early in his or her career, the employee will

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72. See notes 47-48 and accompanying text supra.
73. See notes 49-54 and accompanying text supra.
74. See [1979] PENS. PLAN GUIDE (CCH) ¶¶ 3301-3305.
75. Id.
76. Id. ¶¶ 5691-5696. 5701-5741. In addition, most plans are required to transfer plan assets into a trust or to an insurance company for investment. Id. ¶ 5694. See 29 U.S.C. § 1103(a), (b) (1976).
77. See 29 U.S.C. § 1132(a) (1976): (a) A civil action may be brought (l) by a participant or beneficiary

(B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(3) by a participant, beneficiary or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . .
have a right only to have ultimate benefits or, in the case of defined contribution plans, the amount credited to his or her account measured in a way that is regulated by the plan;\textsuperscript{78} the employee will have no guarantee of eventual payment. Later, he or she will have some benefits that have vested, \textit{i.e.}, become certain eventually to be paid but whose payment is deferred to retirement or termination. Still later, usually when the employee may or must retire, he or she will become \textit{immediately} entitled to payment; the benefits are then matured or in pay status.\textsuperscript{79}

It is logically clear that mature plan interests are property. The Illinois Appellate Court for the Fourth District, for example, recently so held in a case involving military retirement benefits.\textsuperscript{80} The court flatly declared that military retirement pay is "not a gratuity, but an earned property right which accrues by reason of the individual's years of military service."\textsuperscript{81} Similarly, vested or nonforfeitable plan interests should be regarded as property. They are virtually certain to be paid eventually, and their value can be accurately estimated. Most courts that have considered this question have held that vested interests are property.\textsuperscript{82} The most difficult questions are presented by plan interests that have accrued or been earned but are not yet vested. Whether they may be treated as property depends on a fundamental understanding of the term "property."

Any search for a satisfactory general definition of property underscores the circular nature of the problem. Most commentators have concluded that an interest is "property" if courts recognize it as "property." Dean Cribbet notes: "As a layman you are accustomed to speak of the thing itself as property; as a lawyer you must come to realize that property is a concept, separate and apart from the thing. Property consists, in fact, of the legal relations

\textsuperscript{78} See notes 7-9 and accompanying text \textit{supra}.

\textsuperscript{79} A distinction exists between an employee whose benefits are in active pay status, \textit{i.e.}, are actually being paid periodically to him or her, and one whose benefits are mature but not being paid, \textit{i.e.}, one whose right to immediate payment is solely under his or her control. That control may be exercised by retiring, or by making application for payment, depending on the plan terms. Of course, the employee who may but has not yet retired continues to earn benefits, and those earned benefits will vest according to the plan terms. For most employees in this position, benefits should be regarded as mature at the moment when they vest.

\textsuperscript{80} \textit{In re} Marriage of Musser, 70 Ill. App. 3d 706, 388 N.E.2d 1289 (4th Dist. 1979). In Musser, the husband was presently entitled to a military pension of 86,335.80 per year, as a result of service from 1956 to 1975. The parties were married while the husband was in the service, and they divorced after his retirement. In a 2-1 opinion, the court held that the payments were marital property. Though the pension involved was clearly mature, the decision did not turn on that consideration. The majority refused to view even the assumed power of Congress to reduce or terminate military retirement pay as a contingency which should prevent the wife from sharing in the benefits. \textit{Id.} at 709, 388 N.E.2d at 1292. In dissent, Mr. Justice Trapp contended that the future benefits were not property. \textit{Id.} at 712, 388 N.E.2d at 1292.

\textsuperscript{81} Id. at 709, 388 N.E.2d at 1291.

\textsuperscript{82} See cases collected in Annot., 94 A.L.R.3d 176 (1979). See also Elliott v. Elliott, \textit{Minn.} \textit{supra}, 274 N.W.2d 75, 77-78 (1978), and cases there collected at n.8. 277 N.W.2d 77 n.8. See also note 97 \textit{infra}. 
among people in regard to a thing.”

Later in the same work, Cribbet, referring to the situation in which a court declines to grant relief because no property interest is involved and the court will act only to protect property rights, declares: “Is not this reasoning in reverse? If the court grants the protection, it has created a species of property. . . . If it refuses the remedy then no property can be said to exist because ‘take away laws and property ceases.’”

The salient point is that property is precisely that which is recognized as property by courts. Thus, the search for a general definition of property leads one to inquire into the specific factual elements that either (1) have as a matter of prior precedent been found to induce judicial protection of an interest as property or (2) should as a matter of policy induce such recognition. Given the changes in plan terms wrought by ERISA and the limitations on spousal property rights imposed by prior Illinois law, the first approach will yield few applicable Illinois cases.

With regard to the second approach, it is submitted that the courts, in approaching the question of whether plan interests involved in marital disputes are property, should take account of the unique characteristics of divorce proceedings and of modern private pension plan interests. Illinois courts occasionally have attempted to articulate a general definition of property. These definitions have been formulated, however, in factual con-

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83. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 2 (2d ed. 1975) [hereinafter cited as CRIBBET].

84. CRIBBET, supra note 83, at 5, citing J. BENTHAM, THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE, part I, 112 (Dumbut ed., Hildreth trans. 1864). See also id. at v, quoting R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 192 (1922).

In civilized society men must be able to assume that they may control, for purposes beneficial to themselves, what they have discovered and appropriated to their own use, what they have created by their own labor and what they have acquired under the existing social and economic order. This is a jural postulate of civilized society as we know it. The law of property in the widest sense, including incorporeal property and the growing doctrines as to protection of economically advantageous relations, gives effect to the social want or demand formulated in this postulate.


86. See, e.g., Davis v. Attic Club, 56 Ill. App. 3d 58, 371 N.E.2d 903 (1st Dist. 1977). There the court said: “[T]he term ‘property’ in that clause [of the Illinois Constitution] was consistently interpreted to involve every interest anyone may have in any and everything which is the subject of ownership by man, together with the right to freely possess, enjoy, and dispose of the same.” Id. at 58, 371 N.E.2d at 910.

Another recent definition of Illinois property is found in the decision of the United States District Court for the Northern District of Illinois in Webster v. Redmond, 443 F. Supp. 670 (N.D. Ill. 1977).

In Illinois, state law recognizes that the term “property” includes every interest one may have in any and every thing that is the subject of ownership by man; it is a
texts other than those involving marital disputes over pension plan interests. It is not enough to state a "general" definition of property and ask whether pension interests conform to the definitional requirements. Such a deductive approach ignores the special characteristics of both divorce proceedings and pension plan interests. It also ignores the special policy questions involved in divorce proceedings.

Divorce courts are accustomed to retaining jurisdiction over their decrees and exercising a high degree of supervisory power over the immediate parties and even over third parties. It is not uncommon for a decree to require the performance of specific acts over a long period of time, e.g., a court might require that a wife retain possession of the marital home for the children's minority, and that the home then be sold, with a specified division of the proceeds. The argument that nonvested or nonmature plan benefits should not be considered property because they are incapable of immediate enjoyment, or incapable of precise valuation at a particular time, or uncertain as to availability fails given this typical divorce procedure. There is no reason to suppose that divorce courts cannot, in particular cases, cope with those problems through an exercise of their continuing jurisdiction.

Moreover, because of ERISA's accrual requirements, covered plan interests, even though they may not be mature or vested, can be measured. That is, the time when earned, and a method for measuring their value if and when they do vest or mature, will be available from the terms of the plan. This is important for two reasons. First, it means that a court can point to a specific link among plan assets, accrued benefits, and the employee's earnings or years of service or both. Second, the court will have a method for measuring the amount of benefits attributable to the period of the marriage. Thus, the argument that such interests are not property be-

word of general import which applies to every specie of right and interest capable of being enjoyed as such and on which it is practicable to base a money value.

Id. at 676.

One other Illinois definition may offer some guidance. In Harvey Wrecking Co. v. Certain Underwriters at Lloyd's, London, 91 Ill. App. 2d 449, 235 N.E.2d 385 (1st Dist. 1968), property was defined as "a word of the very broadest import, connoting any tangible or intangible res which might be made the subject of ownership." Id. at 455-56, 235 N.E.2d at 388. Cf. Hogan v. Bleeker, 29 Ill. 2d 181, 193 N.E.2d 844 (1963) (holding that liens are sufficiently substantial to be within protection of contract and due process clauses of Illinois and U.S. Constitutions):

In order to be entitled to constitutional protection . . . "a right must be a 'vested right' and must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property."

Id. at 188, 193 N.E.2d at 849, quoting People v. Lindheimer, 371 Ill. 367, 373, 21 N.E.2d 318, 321 (1939).

87. See, e.g., Thompson v. Thompson, No. 78-1720 (1st Dist. Ill. Aug. 22, 1979) (proper for court to require husband to quit-claim home to wife but defer sale of home).

88. See 29 U.S.C. § 1002(23) (definition of accrued benefit); id. § 10054 (benefit accrual requirements); I.R.C. § 411(b) (parallel requirements for plans qualifying for tax advantages); Treas. Reg. 1-411(d)(b)-1 (1978) (detailing requirements of I.R.C. § 411(b)).
cause their measurement cannot be precise, or because their time of acquisition cannot be ascertained fails in light of these simple measurement procedures.

Some special economic and personal aspects of the marital relationship also should be considered. As previously noted, pension rights are for many families the most substantial single asset acquired by the parties. The important expectations attached to this asset by both husband and wife cannot be overstated. They involve, after all, the fundamental belief by both spouses that their mutual security in later years will be protected by pension benefits. They also involve an assumption of interdependence and wealth-sharing that has almost certainly been held jointly by both husband and wife during their years of marriage. As between the two spouses, it would seem unfair to deny to one of them the security and the sharing that both assumed would occur, at least where there are available adequate and fair judicial tools for measuring, valuing, and allocating the interests involved. Moreover, it must be noted that the contributions made to the plan represent economic benefits foregone, either directly or indirectly, by both spouses.

One of the "underlying purposes" of IMDMA, as stated in the Act, is to "mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage." This purpose would be well-served by a recognition that divorce courts should exert themselves to vindicate the legitimate expectations of both parties with regard to pension plan interests earned or accrued during the marriage.

In summary, the unique characteristics of marital disputes and of pension plan interests should be considered in determining whether plan interests are property as that term is used in IMDMA. The well-established and unique continuing supervisory role of divorce courts and the underlying purposes of IMDMA also should be considered. It is submitted that these observations result in the recognition of all accrued or earned private pension plan interests as property as between husband and wife in the context of a marriage dissolution proceeding.

89. See note 21 and accompanying text supra.

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He [or she] must have more than a unilateral expectation of it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Id. at 577 (emphasis added).

As between husband and wife, the institution of marital property, the purposes of IMDMA, the role of divorce courts, and marriage itself surely create much more than unilateral expectations of a sharing in the value of pension plan interests.
There is another approach to this question. It is to recognize that private pension plans complying with ERISA are contractual in nature; they create in employees enforceable entitlements of various types during the employment relationship; these enforceable entitlements are themselves either property or an interest in property, and plan interests therefore constitute "property" as the term is used in IMDMA. 92

It is tempting to label accrued but nonvested plan interests as a "mere" expectancy and therefore not property. 93 The California Supreme Court

92. See F. Childs, Principles of the Law of Personal Property 1-2 (1914) [hereinafter cited as Childs]. See also id. § 53, at 54-56.

Choses in Action, under the modern signification, can be divided into six general classes as follows:

II. The intangible right to enforce a claim against another. This includes—
A. Admitted claims.
1. Before the time of performance has arrived.
2. After the time of performance has arrived.
3. Disputed claims.

Class II. The right to enforce claims generally, as to compel the payment of a debt, a loan of money, rent, a mortgage, a deposit in bank, judgment, or a legacy. This right is not the same before maturity as it is afterwards, as after maturity the owner has a right of immediate action against the other party which he [or she] did not have before, yet before maturity his [or her] right was property which he [or she] could assign. Claims arising from torts are choses in action, as well as those arising under contracts.

93. Childs also suggests that property consists of two separate concepts: "something owned" and "ownership." Id. See note 92 supra. In the context of pension plan interests, these two concepts of property can be expressed as alternative formal approaches to the issue of whether such interests are property: are they interests "in property" (in something that is owned and is itself property); or are they "property interests" (ownership interests)? ERISA's strict funding standards, see [1979] PENS. PLAN GUIDE (CCH) §§ 3301, 3305, are a strong guarantee that the plan's assets, which are purchased with employee or employer contributions, are valuable items such as stock, insurance contracts, or cash. These items obviously are property. Thus, an employee's interest in the plan is property in the sense that it is an interest "in property" or in something owned.

Whether the employee's interest is a "property interest" or an ownership interest is a more difficult question. Certainty and immediate availability at the employee's option are characteristics of a mature and vested interest in plan benefits. Certainty alone is characteristic of a vested but not mature interest in plan benefits, because payment is deferred. An accrued interest in plan benefits that is accrued or earned but not mature or vested does not offer that certainty and it is problematic to term such an interest as an ownership interest in plan assets. Yet an accrued but nonvested interest is a claim of sorts on the assets of the plan. It is a contingent right to some specified, measured amount of those assets, because ERISA requires that a covered plan provide that benefits accrue or are earned during the employment. For defined benefit plans, ERISA requires that the benefit available at retirement accrue over the period of employment at a rate that satisfies one of three criteria. For defined contribution plans, the accrued benefit is the amount credited to the individual employee's account. See note 88 supra.

The rate of accrual may be measured by compensation or by years of service or both, but there must be a specific rate of accrual in the plan terms, and there is then an entitlement to a specific rate and measure of accrued benefits or interest in benefits. Moreover, the accrual requirements make it possible to identify the time when particular benefits have accrued or been earned by the employee. See notes 138-145 and accompanying text infra.
initially took this approach in *French v. French*,\(^9^4\) refusing to recognize nonvested plan interests as property in divorce proceedings. In the 1976 case of *In re Marriage of Brown*,\(^9^5\) however, the California Supreme Court overruled its decision in *French v. French* and declared that nonvested plan interests also were property and subject to division in a marriage dissolution proceeding.\(^9^6\) Courts in other jurisdictions have reached the same conclusion.\(^9^7\)

94. 17 Cal. 2d 775, 112 P.2d 235 (1941).
95. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).
96. In *French v. French*, 17 Cal. 2d 775, 112 P.2d 235 (1941), the California Supreme Court held that nonvested retirement pay was merely an expectancy, not property, and therefore not subject to division upon dissolution of marriage. The appellate court’s decision in *French*, 105 P.2d 155 (Cal. Ct. App. 1940), discussed the particulars of the plan in question, and held that the right to such pay was neither vested, earned, nor acquired during the marriage:

> His right to receive any such pay is still contingent on many things and it cannot now be known whether or not he will ever receive such pay. ...

There was no vested right or interest in this regard which existed at the time the judgment was entered which was community property or which could be thus divided at that time.

*Id.* at 158 (emphasis added).

As contrasted with the earlier case of *Crossan v. Crossan*, 35 Cal. App. 2d 39, 94 P.2d 609 (1939) (where plan allowed for withdrawal of the portion contributed by the employee to the fund if employment discontinued before retirement, the amounts paid into the fund by the employee were community property—a valuable right purchased with community funds and therefore divisible), in *French* there was no certainty of eventual payment in any amount at the time of dissolution. This also was the case in *Williamson v. Williamson*, 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (1962), where the plan did not allow withdrawals and payments were only certain to be made upon retirement.

With the exception of *Williamson*, the cases between *French* and *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), presented two types of situations in dissolution cases to the California courts: (1) situations where pension benefits were fully “matured,” i.e., the event upon which payment was contingent had occurred, and (2) situations where pension benefits were “vested,” i.e., where pension rights could not be reduced or arbitrarily withdrawn by the employer even if subject to other conditions and contingencies which might or might not occur, but not matured.

The California cases involving matured benefits can be divided into two groups. The first group is represented by *In re Marriage of Wilson*, 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974); *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); and *Waite v. Waite*, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972). In each case, the employee-spouses were already receiving monthly pension payments on benefits that had matured during the marriage. The courts had no trouble seeing these amounts as property and thus divisible. The second group is represented by *Phillipson v. Board of Administration, Public Employees Retirement System*, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970); *In re Marriage of Martin*, 50 Cal. App. 3d 581, 123 Cal. Rptr. 634 (1975); *Brown v. Brown*, 27 Cal. App. 3d 188, 103 Cal. Rptr. 510 (1972); *Bensing v. Bensing*, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1972). In each of these cases, the benefits were payable upon the occurrence of events under the sole control of the employee, e.g., application for the benefits (*Bensing, Phillipson*) or choosing to retire (*Brown v. Brown, Martin*). The courts hold that this type of uncertainty was not that which the *French* rule would embrace. These pension rights were held to be property, the courts noting that a contrary ruling would enable the employee spouse to deprive the non-employee spouse of his or her property merely by delaying retirement.

In 1974, the California Supreme Court indicated its willingness to review the *French* rule in *In re Marriage of Wilson*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974). The issue
was not decided, however, as the non-employee spouse had failed to cross appeal at the trial court level (no doubt due to the French ruling itself). Some sentiment against French also was expressed in In re Marriage of Peterson, 41 Cal. App. 3d 642, 115 Cal. Rptr. 184 (1974), which is the first case that clearly held that a vested but unmatured pension right was property and divisible. Both Wilson and Peterson underscore the inequities of the French rule. In Wilson, two sets of pension benefits were at issue. One, a military pension, was mature. Two more years of service were required before the pension would vest—eighteen years of service while married counted for nought. In Peterson, some benefits were vested but not matured, and only a few months remained to the employee's thirtieth year of service, at which point additional benefits would have both vested and matured. If not for the fact that the plan provided some vested but deferred benefits after five years of service, maturing if and when the employee reached age 62, the court noted that the non-employee spouse would have been "totally stripped of her fair share of the only substantial community asset." 41 Cal. App. 3d at 652, 115 Cal. Rptr. at 191. However, the appellate court felt bound by French and could not award any part of the benefits that would vest and mature in only a few months. The view of vested but unmatured benefits as property continued in In re Marriage of Bruegl, 47 Cal. App. 3d 201, 120 Cal. Rptr. 597 (1975). The court reasoned that when there is no way for rights to be withdrawn or reduced, an irrevocable interest in the fund is created and conditions precedent to payment relate to maturity, which does not affect the character of the pension as property fully vested.

The moment of vesting as the sole determinative factor was directly questioned in Wilson. For the first time, the California Supreme Court expressly held that mature pension rights resulting from employment both before and after marriage derive from separate and community property, respectively. Where benefits had matured during the marriage, amounts earned before the marriage were held to be separate property. The pension benefits were thus divisible as community property to the extent earned during the marriage. This approach had been employed without discussion in Fithian, Waite, Bensing, and Brown v. Brown. In re Marriage of Ward, 50 Cal. App. 3d 150, 123 Cal. Rptr. 234 (1975), expanded on this approach. In Ward, the employee spouse's benefits vested 12 days after separation but prior to final dissolution. The benefits were held to be community property up to the time of separation, and separate property thereafter. The Wilson court had employed time of earning rather than time of vesting to distinguish between community and separate property as to benefits "earned" in part before marriage. The appellate court in Ward acknowledged that even though "nonvested" during the entire period prior to separation, the benefits earned during the marriage, once they vest, are community property up to the separation. The California courts were thus in the position of proclaiming that the character of benefits as separate or community depended on time of earning, even though the benefits were not property until they were vested.

In In re Marriage of Brown, 10 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), the California Supreme Court recognized that the French rule was untenable. The Brown court overruled French, and held that nonvested benefits were also property subject to division. The holding was based on contract principles, with the supreme court reasoning that because pension benefits are a form of deferred compensation for services rendered, the employee's right is a contractual right derived from the terms of the employment contract. A contractual right is a chose in action rather than an expectancy, and therefore a form of property. The right is acquired when the employee enters upon performance of the employment contract. A nonvested pension right, the court asserted, had been characterized in other contexts as a contractual right and therefore a property right. Also, the French theory was rejected because it was inconsistent with the treatment of other situations where community funds or efforts are expended to acquire a conditional right to future income. 15 Cal. 3d at 847-52, 544 P.2d at 566-70, 126 Cal. Rptr. at 638-42.

The French "expectancy" approach is untenable in terms of both doctrinal principle and basic fairness to the parties. As between parties whose dispute is over the allocation of rights against a third party, it is a non sequitur to defeat the claim of one by characterizing the right of the other vis-a-vis the third party as an expectancy. That characterization is material to a different controversy. The nature of the spouse employee's claim to retirement


An Illinois appellate court recently took the same view of nonvested private plan interests. In In re Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1st Dist. 1979), it was held that nonvested plan interests earned during the marriage should be treated as marital property. The court remanded the case to the trial court for further proceedings as to valuation and allocation of the interests involved.

In Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975), the New Jersey Supreme Court announced its view that, where the "equitable distribution" of property acquired during the marriage was concerned, "the concept of vesting should probably find no significant place . . . ." 66 N.J. at 348, 331 A.2d at 262.

In Elliot v. Elliot, ___ Minn. ___, 274 N.W.2d 75, 77-78 (1978) the Minnesota Supreme Court held that pension benefits are property. The court did not distinguish between vested and nonvested benefits. The benefits involved were vested and matured. Id. at ___, 274 N.W.2d at 76. See also additional cases collected in id. at 77 n.8, most involving vested benefits. See also cases collected in Annot., 94 A.L.R.3d 176 (1979). Contra, see, e.g., Yelkin v. Yelkin, 193 Neb. 789, 229 N.W.2d 59 (1975).

Indiana courts have taken a somewhat ambivalent position, holding that even benefits that are mature are not "a vested present interest that would allow them to be a part of a property division." Savage v. Savage, ___ Ind. App. ___, 374 N.E.2d 536 (1978). Cf. Goodwill v. Goodwill, ___ Ind. App. ___, 382 N.E.2d 720 (1978), where the Indiana appellate court, sitting en banc, held that a pension plan is "a factor to be considered in dividing existing marital property." Id. at ___, 382 N.E.2d at 723 n.2. This position would mean that the pension plan is significant when there is other marital property sufficient to compensate the non-employee spouse for the loss of his or her marital share of the pension plan. Where, however, there is little or no other marital property, a direct cash or installment award of a share of the value of plan interests would be precluded. This approach seems unsound in that it insulates the plan interests from being treated as property in precisely the circumstances where it is most equitable to do so, that is, where the plan interest is the most substantial asset acquired during the marriage.

98. See GRAY, supra note 96, at 161-63.

99. In an employer-employee dispute, a "mere expectancy" that benefits will be paid will be an insufficient basis for a cause of action demanding the immediate payment of benefits. A controversy between divorcing spouses, however, involves considerations other than the existence of eventual or immediate entitlement to benefits. The economic core of a divorce controversy is a request to a court: (1) to determine present and future property and personal rights of the parties as between themselves and (2) to supervise the vindication or satisfaction of those rights. The surrogate powers of a trustee in bankruptcy are analogous: at the appointment stage, the trustee simply succeeds to the bankrupt, "standing in his shoes" with regard to the debtors of the bankrupt. It would be peculiar to suggest that the nature of the particular obligation owed to the bankrupt was material to the appointment of a trustee, that is, to the question of whether a trustee should be made the financial surrogate of the bankrupt. Yet this is precisely
plan assets as against plan administrators should not be regarded as controlling in a divorce dispute between the spouses.

The status of the plan interest as accrued only; accrued and vested; or accrued, mature, and vested, is relevant only to problems of present valuation and to problems with regard to the desirability of particular methods for allocating the interests involved. To the extent that a right to future benefits or a given amount of contributions has accrued or been earned by the employee during the marriage, the present value of that amount as of the time of dissolution should be regarded as property acquired during the marriage.

Having examined the Illinois non-divorce case law dealing with retirement plans and having introduced the general proposition that accrued or earned benefits should be regarded as property in the divorce context, it is appropriate to consider Illinois cases that have involved the allocation of retirement plan interests on divorce.

**Illinois Decisions Involving Pension Plans in Divorce Context**

Few Illinois cases have dealt with private pension or retirement plans in the context of divorce litigation. All but one have involved plans not subject to ERISA, and have been decided under pre-IMDMA divorce law.

In *David v. David*, the trial court awarded the wife a portion of the husband's interest in a profit-sharing plan. The First District Appellate Court reversed. Noting that the trial court had reserved the question of alimony, the appellate court concluded that the award necessarily was made under section 17 of the Divorce Act, which authorized an award to a spouse of "property equitably belonging" to him or her. Invoking the tangible contribution requirement for establishing special equities, the court found no

what is suggested by the analogous notion that the nature of the employee's rights against an employer should be dispositive of the question of whether some or all of those rights should be allocated to the spouse of the employee.

100. There are two basic methods of allocation: (1) an immediate award of the present value of plan interests through an award of other property having the same value; and (2) an order that the non-employee spouse receive a specified percentage share or dollar amount of each benefit payment made to the employee spouse. Method (2) is useful in cases where the probability of maturity, though well-estimated, is so low as to make it unreasonable to place the risk of ultimate nonpayment solely on the employee-spouse. This approach also would recognize that there is some premium for the non-employee spouse from immediate payment (liquidity), that is not taken into account in an immediate allocation based on the present value of the deferred benefit. It would seem equitable to switch from method (1) to method (2) when the probability of maturity falls below 50%. Alternatively, the court might allow the employee spouse, as the person most likely to feel disadvantaged by a method (1) award, to choose the type of award made. See notes 152-56 and accompanying text infra.

101. This is the amount attributable to earnings foregone during the marriage, and it is the amount traceable to the assets of the plan.

102. 102 Ill. App. 2d 102, 243 N.E.2d 485 (1st Dist. 1968).

103. Id.

evidence that "personal funds" of the wife were used to increase the husband's interest in the profit-sharing plan.\textsuperscript{105}

In the case of \textit{Busby v. Busby},\textsuperscript{106} the Third District Appellate Court held that it was proper for the trial court to include the present value of the husband's retirement plan among the assets of the parties, and for it to award the asset to the husband as part of the property division.\textsuperscript{107}

In \textit{Mogged v. Mogged},\textsuperscript{108} the Third District Appellate Court affirmed a decree awarding the wife an amount equal to one-half of the value of "credit-savings" held for the husband by his employer. The court felt no need to consider whether the "credit-savings" were property or something else, because the award was characterized as a lump-sum in lieu of alimony\textsuperscript{109} and was authorized by section 18 of the Divorce Act.\textsuperscript{110}

Most recently, the First District Appellate Court, in \textit{In re Marriage of Hunt},\textsuperscript{111} held that an employee's contractual right to an interest in a retirement plan is property, regardless of whether the interest is matured, vested, or nonvested. The trial court's division of property was vacated for consideration on remand of issues of valuation and allocation of the plan interests.

\textit{David}, \textit{Busby}, and \textit{Mogged} left open several questions regarding the treatment of retirement plans in divorce proceedings. There was no need in \textit{David} to place either a property characterization or a value on the profit-sharing plan because of the court's conclusion that it was neither a section 17 award (no title, no special equities) nor a section 18 award (alimony was reserved), and that it could not be valid on any other ground.\textsuperscript{112} For the same reason, there was no need for the \textit{David} court to concern itself with the present availability of the husband's interest or with the degree of certainty that it would ever become available to the husband.

In \textit{Busby}, the court assumed, without discussing the point, that the present value of the husband's retirement plan was measured by the amount he would receive if he resigned from his employment, and held that this value was an asset that could be allocated as part of the property division.\textsuperscript{113}

Once the issue of a retirement plan's nature as property was settled, pre-IMDMA views of the primacy of common-law title and the case law limitations on special equities\textsuperscript{114} made it doubtful that a retirement plan could "belong" to anyone but the person with record title. Therefore, in the absence of any property right in the wife, the plan interest could only be

\textsuperscript{105} 102 Ill. App. 2d at 111, 243 N.E.2d at 490.
\textsuperscript{107} Id. at 431, 296 N.E.2d at 588.
\textsuperscript{108} 5 Ill. App. 3d 581, 284 N.E.2d 663 (3d Dist. 1972), rev'd on other grounds, 55 Ill. 2d 221, 302 N.E.2d 293 (1973).
\textsuperscript{109} Id. at 589, 284 N.E.2d at 668.
\textsuperscript{110} ILL. REV. STAT. ch. 40, § 18 (repealed 1977).
\textsuperscript{111} 78 Ill. App. 3d 653, 397 N.E.2d 511 (1st Dist. 1979).
\textsuperscript{112} 102 Ill. App. 2d at 110, 243 N.E.2d at 489-90.
\textsuperscript{113} 11 Ill. App. 3d at 431, 296 N.E.2d at 588.
\textsuperscript{114} See, e.g., Everett v. Everett, 25 Ill. 2d 342, 185 N.E.2d 201 (1962).
subject to division for the benefit of the wife on an “alimony” or “in lieu of
alimony” theory. This reasoning sequence led the court to view the
question of whether and how to divide the retirement plan solely from the
standpoint of need (alimony) rather than entitlement (property). So viewed,
the availability to the wife of Social Security benefits as well as periodic
alimony was dispositive, and the court was relieved of any potentially
troublesome problems regarding the correct value of the plan, its precise
nature as property, and its proper allocation between the parties.

The appellate court’s opinion in Mogged also presents some unresolved
problems. The approval of the account division suggests that questions not
addressed in David or Busby were here addressed and decided; yet there is
no discussion of these issues. The court avoided characterizing the award as
one of property by treating it as an award of a lump-sum of money under
section 18. Precise valuation was simple because the court selected as the
measure of value the amount in the account at the time of the order. Allocation
problems were avoided by determining that a fifty-fifty division was
neither “inequitable” nor an abuse of discretion. Problems with regard
to whether the asset was acquired before or during the marriage were
avoided by determining that “most” of the amounts involved were accumulated
during the marriage. Those same time-of-acquisition problems, as well as
valuation problems arising from amounts that might be acquired after the
divorce, also were unnecessary to resolve because of the court’s determina-
tion that the account was to be valued as of the date of the trial court’s
order. This time was chosen even though the account funds could not pres-
ently be withdrawn and would presumably continue to accumulate inter-
est income or otherwise appreciate beyond the date of the divorce. The
court’s approach thus had the effect of denying the wife any share of a post-
divorce increase in plan assets, even though a portion of the increase would
be solely attributable to amounts placed in the account during the mar-
riage.

The Mogged court also avoided certain problems relating to the nature of
the plan as property. The asset involved was not immediately available, al-
though apparently it was certain to become available on the occurrence of
any one of a number of contingencies: resignation, retirement, lay-off, or
absence because of illness. Without considering the legal consequences
of the lack of immediate availability, the court approved the trial court’s
award of a “lien” that amounted to an order requiring that half the amount

115. 11 Ill. App. 3d at 431, 296 N.E.2d at 588.
116. Id.
117. 5 Ill. App. 3d at 589, 284 N.E.2d at 668.
118. Id.
119. Id.
120. IMDMA requires that the increase in value of property acquired before the marriage be
treated as non-marital property. ILL. REV. STAT. ch. 40, § 503(a)(5) (1977). By analogy, the
increase in value of property acquired during the marriage should be treated as marital prop-
erty.
121. 5 Ill. App. 3d at 589, 284 N.E.2d at 668.
in the account as of the date of the trial court's order be given to the wife whenever the funds should become available.\textsuperscript{122}

The \textit{Mogged} court showed no concern for problems relating to the enforcement of the trial court's order. As noted, a "lien" was placed on the amount then in the account and the employer was "directed" to pay the wife one-half of the amount "at such time as it becomes payable."\textsuperscript{123} It was not indicated whether the employer was a party in the trial court proceedings, or otherwise subject to the court's jurisdiction, nor did the court indicate the nature of the lien placed on the amount held by the employer.

Three broad principles emerge from cases decided prior to ERISA and IMDMA. First, while it was not expressly decided whether the interests involved are property rights or are something else, there is nothing in any of the cases that would preclude the characterization of those interests as property. In \textit{David}, the court's use of special equities rules implies a property characterization. The court in \textit{Busby} specifically approved the inclusion of retirement plan assets in the division of property. The imposition in \textit{Mogged} of a lien on the husband's credit-saving plan is consistent only with a view that the amounts involved were property even though no portion of the funds was immediately available. Nonetheless, in these cases no portion of plan rights was allocated in a property division unless it was certain that, on the occurrence of some employment-related contingency, a calculable amount would become available. Only those amounts certain to come eventually into the hands of the employee were regarded as available for the division. This may imply a limited concept of property, or it may imply only an equitable or practical limitation on the types of property that could be made subject to an apportionment to the non-employee spouse.

In \textit{Mogged}, for example, the court valued the credit-savings plan as of the date of the court's order. The amount so determined was the amount then certain eventually to become available to the husband. But it was also the value of the plan as of the termination of the marriage, and that sum need not be regarded as defining all of the plan that was properly characterized as property; it may be regarded as merely that portion of the property vulnerable to appropriation by the wife.\textsuperscript{124} Under this view, all interests created by the plan, including future contributions to it, might be regarded as property interests, but only those portions accumulated or earned during the

\begin{itemize}
\item \textsuperscript{122} \textit{Id. Cf. Schwarz v. Schwarz, 27 Ill. 2d 140, 188 N.E.2d 673 (1963) (award of alimony could not be made a lien on personal property). See Lenz v. Lenz, 33 Ill. App. 3d 568, 573, 337 N.E.2d 195, 199 (2d Dist. 1975), where it was stated that "the court in a divorce case has no power to make a money decree a lien on personal property." In neither \textit{Schwarz} nor \textit{Lenz}, however, was the aim of the court decree to divide the very property to which the lien attached." The \textit{Mogged} lien, by contrast, was designed to effectuate the conveyance of the property itself, not merely to secure the payment of a general money decree. The account was viewed as personal property whose conveyance could be required by the court. The lien assured the conveyance in futuro of a property interest.
\item \textsuperscript{123} 5 Ill. App. 3d at 559, 284 N.E.2d at 668.
\item \textsuperscript{124} \textit{In re Estate of Schwarz, 76 Ill. App. 2d 114, 119-20, 220 N.E.2d 889, 892 (4th Dist. 1966), contains dicta limiting equitable liens to specific property and precluding their aplicability.}
PENSION PROPERTY

marriage could equitably be made available for apportionment between wife and husband. The court’s failure to consider the post-divorce increase in value may have been unfair to the non-employee spouse, but that is not to say that the increase could not itself be regarded as property.

Second, the possibility was left open for a wife to establish “special equities” in a plan. This is consistent only with an identification of plan interests as property. The requirement of tangibility and the exclusion of homemaker services rendered the establishment of special equities factually impossible in most cases, but this barrier arose from the definition of “special equities,” not from a limitation on the concept of property.

Third, a plan interest could be reached by a wife through an award in lieu of alimony. Such awards were available so long as the wife was entitled to alimony and an award “in gross” or in lieu of alimony was equitable under all the circumstances. This was the type of award that was approved in Mogged.

In summary, pre-ERISA, pre-IMDMA Illinois case law did not preclude, and in Mogged had approved, the characterization of retirement plan interests as property in divorce proceedings. Cases prior to the recent appellate court decision in Hunt thus were not inconsistent with a characterization even of nonvested plan interests as property. The failure to award nonvested plan interests as property in those early cases was due to policy or equitable considerations other than a reluctance to characterize such interests as property. The Hunt court was correct in declaring that earned or accrued private plan interests should be treated as property in the context of IMDMA proceedings. If the Hunt holding should become the settled Illinois position, Illinois would join a sizable group of states whose courts have held that the employees’ interests in a retirement plan are property if they have accrued or been earned under the terms of the plan. It would be unrealistic and contrary to the modern concept of property to draw the line between property and non-property at the point of “vesting.” Moreover, to do so in the divorce context would frequently deprive the non-employee

125. See Persico v. Persico, 409 Ill. 608, 100 N.E.2d 904 (1951). See also Harding v. Harding, 18 Ill. App. 3d 550, 310 N.E.2d 19 (4th Dist. 1974). But see Sahs v. Sahs, 48 Ill. App. 3d 610, 363 N.E.2d 156 (2d Dist. 1977), where the trial court was found to have improperly awarded both periodic alimony and alimony in gross. Such an award was improper under pre-IMDMA case law. See also Overton v. Overton, 6 Ill. App. 3d 1086, 287 N.E.2d 47 (2d Dist. 1972). The Sahs court noted: “Furthermore, even if the trial court had not awarded periodic alimony, it would not have been proper for it to give the wife a disparate interest in the marital home. Such an award is proper only where special equities have been pleaded and proved.” 48 Ill. App. 3d at 613, 363 N.E.2d at 158. This passage may be read as requiring that special equities be proved in order to justify a conveyance of specific property in lieu of alimony. Such an interpretation is flatly inconsistent with Persico. The Sahs dictum should be taken only to mean that it would be inequitable to award a “disparate” share of the marital home to one spouse without a showing of special equities.

126. See notes 92-97 and accompanying text supra.
spouse of any opportunity to share in property that was “acquired” during the marriage. 127 Concededly, it is only after vesting that there is certainty of eventual pay-out. It is superficially appealing to find that it is only at this point that a property interest has come into existence. As has been noted, however, the accrual of benefits also marks an important transition point. It is at that point that earnings, contributions, and the employee’s years of service become transmuted into a well-defined future benefit, or, in the case of an individual account plan, into a specific dollar amount or number of investment units credited to the employee. This accrued benefit or contribution is concrete and well-defined, and it is traceable into a tangible property contribution and to plan assets. It also represents an expenditure of family time and effort that has not been otherwise accounted for or compensated. 128 The accrued benefit should be regarded as property to the extent that it is credited to the employee.

Whether to identify plan interests as marital property under IMDMA would turn, then, on whether the interests were “acquired” during the marriage.

Time of Acquisition of Retirement Plan Interests

Section 503(a) of IMDMA defines marital property as that property “acquired . . . subsequent to the marriage,” 129 and creates a presumption that property is marital property if “acquired . . . after the marriage and before a judgment of dissolution of marriage or declaration of invalidity.” 130 Thus, it is important to determine whether retirement plan interests have been “acquired” during the marriage.

If plan interests are considered to be property because they are traceable to contributions earned from the employer or made by the employee, or because their accrual and measurement are definitely specified by contractual provisions in the plan, the proposition that they are “acquired” when they are earned or accrued is supported by the same arguments that support the proposition that they are property. 131 If being “earned” and identifiable constitutes the interests as property, it would seem a fortiori that those same attributes compel the conclusion that they are then “acquired.” Moreover, the same tangibility and traceability considerations that support a characterization of plan interests as property when earned or accrued support a conclusion that the rights are acquired when earned or accrued. For

127. See note 97 supra.
130. Id. § 503(b).
131. See notes 96-97 and accompanying text supra.
plans subject to ERISA, this time of acquisition would correspond to the
time when an employee acquired "accrued benefits." 132

Plan interests should be regarded as having been acquired when, under
the terms of the plan, they have "accrued." If the benefits have accrued
during the marriage, they should be treated as marital property. Their time
of accrual is the most accurate indicator of the time during which other
expenditures were foregone in order to accumulate future benefits. In the
case of a plan employing individual accounts, the interest would be acquired
when the contribution is credited to the employee's account. In the case of a
plan that does not employ individual accounts, the interest would be ac-
quired when and to the extent that the employee was allowed an accrued
benefit under the plan terms.

Plan interests that have accrued prior to the marriage or after a judgment
of legal separation should be treated as non-marital property. 133 In Musser
v. Musser, 134 the Illinois Appellate Court for the Fourth District suggested
that the portion of benefits acquired during the marriage may be calculated
by constructing a fraction, with the total number of months of participation
in the plan as the denominator, and the number of months of participation
while married as the numerator:

\[
\frac{\text{no. of months of married participation}}{\text{no. of months in plan}} = \frac{\text{fraction of present value of benefits acquired during marriage}}{\text{value of benefits}}
\]

The fractional method is most accurate when the date of participation in
coverage and the date of marriage are close together. If the marriage occurs
long after coverage begins, the fractional method is less accurate. How-
ever, the errors caused tend to cancel one another. The method in effect
assumes that the amount accrued per month is the same in the early years as
it is in later years. Actually, amounts accrued per month generally increase
over time because of increasing salary and because the plan is "back-loaded,"
i.e., provides for increasing rates of accrual in later plan years. This error
disfavors the late-marrying non-employee spouse. The fractional method
ignores, however, the fact that contributions made in early years of par-
ticipation have been accumulating income longer than later contributions
and thus, other things being equal, have contributed more to the total value
of the interest than later contributions. This error favors the late-marrying
non-employee spouse.

132. See note 36 supra.
133. See ILL. REV. STAT. ch. 40, §§ 503(a)(6) (prior to marriage), 503(a)(3) (after legal
separation) (1977). Note that the increase in value of property acquired prior to the marriage is
also non-marital property. Id. § 503(a)(5). This requirement makes rigorous valuation more
complex. See note 134 and accompanying text infra.
134. 70 Ill. App. 3d 706, 388 N.E.2d 1289 (4th Dist. 1979). A similar fractional approach is
suggested in Hunt.
Because the errors tend to cancel each other, the fractional method yields a fair approximation, but one may wish, with the aid of an actuary, to calculate the actual amounts accrued during each month of the marriage, together with an estimate of amounts earned by the contributions.

Valuation

A court which is allocating accrued plan interests should attempt present valuation whenever possible. It obviously is desirable to reach the best estimate of the amount of wealth that is represented by plan interests as a step toward a just division.

Valuation depends in part on the type of plan involved. In a defined contribution plan, employing individual accounts to which contributions are credited, the best estimate of present value is the amount currently credited to the employee's account. An adjustment, however, must be made if the account figure is not vested or if it is not payable when the employee dies prior to reaching retirement age. If those factors are present, then the account balance must be discounted for the probability of vesting and for the probability of survival to retirement. Accounts containing only employee contributions are always 100% vested. Because ERISA does not permit forfeiture of vested employee contributions, such an account need not be discounted for either vesting or survival probability.

For the same employee's employer-contributions account, the computation is more complex. Depending on the plan terms, survival probability, as well as the probability of vesting, may be relevant. ERISA will dictate that some proportion of the account is vested, according to years of service and

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135. ERISA defines "present value" as follows: "The term 'present value,' with respect to a liability means the value adjusted to reflect anticipated events." 29 U.S.C. § 1002(27) (1976).


137. As noted, ERISA precludes forfeiture of accrued benefits from employee contributions if the employee dies prior to retirement. These accrued benefits must in all events be paid to a beneficiary or to the employee's estate. Once benefits are in pay status, however, the plan may provide for termination of payments on death (subject to the provisions for joint and survivor annuities). Benefits derived from employer contributions may, but need not, be treated by a plan as forfeitable to the extent the accrued benefit has not been paid or distributed to the employee prior to his or her death. Treas. Reg. § 1.411(a)-4(b) (1978); 29 U.S.C. § 1053(a)(3)(A) (1976); I.R.C. § 1.411(a)(3)(A). Such benefits, however, cannot be forfeited if the benefit must be paid because of the operation of the joint and survivor provisions of ERISA. See I.R.C. § 401(a)(11); 29 U.S.C. § 1055 (1976).


140. *Id.* Assume that X participates in a defined contribution plan with separate individual accounts for employee and employer contributions. Assume also that (1) the retirement age is 65, (2) X became employed at 55 and is now 62, (3) X's employee account is credited with $10,000.00 in vested contributions, and (4) X's employer-contributed account is credited with $5000.00 in non-vested contributions. The present value of the employee account is $10,000. The probability of survival to retirement need not be considered and the probability of vesting is necessarily one (i.e., it is certain).
perhaps according to age at employment.\textsuperscript{141} For both the vested and nonvested portions of this account, the computation of present value must factor in the possibility of forfeiture (if the plan provides for such forfeiture) should the employee die prior to pay-out of the benefits. For the nonvested portion, the employer account must be discounted for the vesting probability as well. That probability cannot be obtained from a well-accepted and settled source such as a life insurance mortality table. Vesting depends on continued employment with the same employer. The probability of continued employment might be obtained by an examination of past experience in the company or of past experience in the industry.\textsuperscript{142} though such data are difficult to obtain.

For defined benefit plans the computation involves additional variables. These programs promise a future benefit. The plan spells out a method for computing the future monthly or annual benefits that, as of a given time, have accrued to the employee, usually according to years of service and some measure of average compensation.\textsuperscript{143} To the extent that the plan is actuarially sound, it will pay that benefit to the employee from retirement until death.\textsuperscript{144} Thus there exists, as of the date of divorce, an ascertainable, actuarially determined, future lump-sum that will become payable until death to the employee (usually in monthly installments) on his or her retirement. The present value of this future sum is actuarially calculable. The variables of survival probability (for employer contributions) and vesting

\textsuperscript{141} 29 U.S.C. § 1053 (1976); I.R.C. § 411(a).

\textsuperscript{142} See Projector, supra note 136, at 235-37. Occasionally the probability can be estimated from common sense. The probability of non-vesting is nearly zero (absent bad faith by employer or employee) for a 64 1/2 year old employee whose employer contributions will change from 0\% vested to 100\% vested on his 65th birthday. But for employees whose vesting is further away in time, the difficulties are substantial. Experience data are not usually available. \textit{Id}. It has been suggested that the probability of vesting be regarded as equal to the fraction of years completed divided by years needed to vest. \textit{Id}. Because this probability is not based on any prior frequency experience, it is a "subjective" probability and statistically suspect. See M. BALMER, PRINCIPLES OF STATISTICS 6-8 (1979). Where experience data is not available, however, the approach may be useful. If this approach is applied to the employee in the earlier example, note \textsuperscript{140} supra, who has seven years of service and whose entire non-vested (employer contributed) portion of the account will become 100\% vested after 10 years of service, the probability of vesting would be

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\frac{\text{years of service}}{\text{total years needed to vest}} = \frac{7}{10} = .70.
\]

The present value of the nonvested portion of the employer account is .70 x the nonvested amount in the employer account, multiplied again by the probability of survival to retirement. If the non-vested portion of the account contains $5,000.00, the probability of survival to retirement (from a mortality table) is .85, and if forfeiture occurs when the employee dies prior to retirement, then the present value of the employee's interest in the employer account is $2,975.00 (.70 x .85 x $5,000.00), discounting for both survival and vesting.

\textsuperscript{143} MAMORSKY, supra note 7, at 6-9.

\textsuperscript{144} One of the most common forms of payment is a single life annuity. The plan may, of course, provide for other modes of payment; ERISA then requires actuarial equivalence with the single life annuity. See generally Treas. Reg. § 1.411(c)-1. See also [1979] PENS. PLAN GUIDE ¶¶ 3101-3120; Rev. Rul. 76-47; 1976-7 I.R.B., reprinted in [1979] 4 PENS. PLAN GUIDE (CCH) ¶ 19,403.
probability again must be considered to obtain the present value. Because the accrued benefit is, by definition, the periodic amount payable from the future value of accumulated plan funds, an additional factor is, however, present. The amount of the predicted benefit rests on an actuarial assumption that plan funds will enjoy some average annual rate of return. Thus, an assumed annual interest rate must be used as the basis for discounting the future value of accrued benefits to their present value.\(^{145}\) The discount rate chosen will yield the sum of money which, if invested at the rate chosen, with interest compounded for the years remaining to retirement, would appreciate to the amount necessary to provide the accrued benefits. Once this sum of money is calculated, the factors discussed above relating to probability of vesting and probability of survival to retirement are applied, as appropriate, to estimate present value.\(^{146}\)

Another approach to valuing defined benefit plan interests would be to adopt ERISA's own methods for computing the present value of plan benefits. One of the innovations of the Act is the creation of the Pension Benefit Guaranty Corporation (PBGC).\(^{147}\) The PBGC is an insurer for the payment of benefits in the event of termination of a plan subject to ERISA. It is PBGC's statutory obligation to calculate the present value of benefits payable under a terminated defined benefit plan.\(^{148}\) The PBGC has promulgated regulations prescribing in detail the actuarial methods and assumptions to be employed in valuing benefits accrued under a defined benefit plan.\(^{149}\) The methods prescribed are complex, and the interest rate assumptions employed have been questioned.\(^{150}\) Nonetheless, the methods are well-specified, actuarially sophisticated, and probably the single most defensible

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\(^{145}\) If there are explicit rate of return assumptions in the plan document, that interest rate may be chosen. An alternative is to look at the actual income experience of the plan. In times of greater interest rate stability, this approach may be preferable as plan assumptions are likely to be conservative. A third approach would be simply to choose a traditional discount rate, commonly 6%. In today's monetary climate, this approach has little to recommend it. Finally, one may employ the discount rate prescribed by regulations promulgated under ERISA itself. The interest rate presently prescribed for valuation of matured ("immediate") annuities is 7.5%. See 29 C.F.R. app. B § 2610, (1978), as amended by 44 Fed. Reg. 42180 (1979). This interest rate is employed by the Pension Benefit Guaranty Corporation (PBGC) to value mature or "immediate" annuities for plans terminating between Sept. 1, 1978, and March 1, 1979. See note 152 and accompanying text infra.

\(^{146}\) See Projector, supra note 136. For purposes of this computation, the date of divorce is treated as the date of separation from employment. This assumption has the effect of denying the non-employee spouse a share of benefits accruing from subsequent employment. If the plan is fair to the separating employee, it will thus also yield a fair result for the spouse.


\(^{148}\) Id. §§ 1322(b)(4)(A), 1344, 1362(b)(1)(A).

\(^{149}\) 29 C.F.R. §§ 2610.1-2610.10 & appendices (1978). In effect, the PBGC regulations estimate the present value of plan benefits on the assumption that they are payable as annuities. Id. § 2605.4. Methods are specified for the valuation of "immediate" annuities, id. § 2610.5 and for "deferred" annuities, id. § 2610.6.

uniform methodology for calculating the present value of an interest in a
defined benefit plan. The PBGC regulations do not, however, take into ac-
count the probability of vesting.151 Thus, use of the approach for nonvested
benefits would involve computing the present value of accrued benefits
under the PBGC assumptions, then multiplying this value by the probability
of vesting.152

In any divorce case involving valuation at pension plan interests, the pru-
dent attorney should consult an actuary as well as an attorney knowledgeable
in the pension field. Particularly where a defined benefit plan is involved,
the aid of an expert is essential. Once the courts have determined the broad
methods and acceptable sources of assumptions to be employed in valuation,
it may be expected that parties will be able to stipulate to the present value
of plan interests.

It is desirable in most cases to reach an estimate of present value. This
estimate permits the court to define more precisely the value of all assets
acquired during the marriage. It may also permit the immediate allocation of
assets in a way that will minimize the need for the former spouses' con-
tinued intrusion into each other's economic activities, and thus reduce the
potential for friction and continued litigation.

If there is sufficient marital property other than plan interests, the non-
employee spouse's share of the present value of plan rights may be allocated
to the non-employee spouse in the form of an offsetting award of other,
immediately available marital property, leaving the employee spouse fully
entitled to the plan benefits. This method offers the advantages of: (1) end-
ing the litigation; (2) avoiding continued judicial supervision and the poten-
tial for awkward judicial interference in benefit payments and plan adminis-
tration; and (3) in general, sparing husband and wife continued entanglement

151. Because the PBGC guarantees only vested (non-forfeitable) accrued benefits, the regula-
tions are not concerned with the probability that accrued benefits will become vested.
152. The rigorous use of the methods set out in 29 C.F.R. § 2610 (1978) would involve: (1)
construction of a mortality table using probabilities set out in 2610, appendix A; (2) computa-
tion of the value of a mature accrued benefit as of the time it commences, using the appropriate
equation for immediate (mature) annuities found at id. § 2610.5; (3) computation of the present
value of non-mature (deferred) benefits by using the appropriate equation from id.§ 2610.6
for the valuation of deferred annuities (this involves applying to the mature value of the accrued
benefit a factor that takes into account both mortality and currently projected fluctuations in the
interest rate); and finally (4) multiplication of the figure from (2) or (3), as appropriate, by the
assumed probability that benefits accrued as of the date of valuation will vest.

It should be noted that appendix C of 29 C.F.R. § 2610 (1978) contains illustrative benefit
valuation results for deferred and immediate annuities, calculated on the basis of interest rate
and mortality assumptions employed by PBGC as of Sept. 15, 1974. PBGC periodically revises
its interest rate assumptions on the basis of market survey data. See, e.g., 44 Fed. Reg. 10398
(1979).

All plans subject to ERISA are required to file an "Annual Return/Report," I.R.S. Form 5500.
For plan years beginning in 1979, most plans with 100 or more participants must file, in addition,
a document, "Schedule B," which contains specific "actuarial information," including: (1)
present value (aggregate) of vested benefits; (2) present value (aggregate) of non-vested accrued
benefits; and (3) information regarding the actuarial assumptions used in computing the present
in each other's lives. The California Supreme Court employed such a method of allocation with approval in *In re Marriage of Milhan*.

Occasionally, however, present valuation with immediate allocation is simply too complex, or is otherwise undersirable or impractical. As the California Supreme Court suggested in *Brown*, "if the court concludes that because of uncertainties affecting the vesting or maturation of the pension that [sic] it should not attempt to divide the present value of pension rights, it can instead award each spouse an appropriate portion of each pension payment as it is paid." 154

This "wait-and-see" allocation avoids the troublesome speculativeness and the cumbersome calculations involved in estimating a present value for retirement plan rights. It has some disadvantages as well, however. The parties' economic affairs remain intertwined. The non-employee spouse retains a strong interest in assuring that vesting and maturation will take place. Conversely, the employee spouse has an added degree of control over the economic fate of the non-employee spouse. The vesting of the plan rights, as well as their time of maturation, is wholly or partly under the control of the employee spouse, and to that extent, the non-employee spouse's share of this wealth is wholly or partially extinguishable at the whim of the employee spouse. While in most cases it would be irrational for the employee to resign prior to vesting solely to deprive the other of benefits, divorcing spouses are not immune from such impulses. In addition, to some extent, the employee's incentive to continue employment may be reduced by awareness that a fraction of his or her ultimate benefits will be taken. This disincentive is, of course, irrational, because if the award is properly calculated, no benefits earned after the marriage are affected, and no wealth will be "taken" that would not have been "taken" by the non-employee spouse in some fashion regardless of which allocation method was chosen.

Any order that affects benefits as they are paid has the potential for entangling plan administrators themselves in future litigation. If the order is directed only to the spouse, there is a danger that he or she will refuse to

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154. 15 Cal. 3d at 849-50, 544 P.2d at 567, 126 Cal. Rptr. at 639. See *In re Marriage of Hunt*, 78 Ill. App. 3d at 663, 397 N.E.2d at 519, in which the court stated:

In those instances where it is difficult to place a present value on the pension or profit sharing interest due to uncertainties regarding vesting or maturation, or when the present value can be ascertained by the type, or lack, of other marital property...
pay. The dissatisfied non-employee spouse must then proceed against the employee by citation for contempt or by judgment coupled with execution, attachment, garnishment, or citation against the employer or plan administrators. The problems thus caused are the same where retirement benefits are involved as they are when any periodic award is made in a divorce case: continued court supervision is cumbersome; remedial devices are either limited and archaic (garnishment, successive judgments) or Draconian (contempt). Moreover, Illinois enforces spendthrift clauses, almost surely preventing third-party enforcement in most situations involving plans subject to ERISA. Although the drawbacks to third-party enforcement in and of themselves may be insurmountable, two other problems are posed by the involvement of plan administrators, either in the original action or later in the course of attempted enforcement. First, an adverse reaction to judicial compulsion is common among employers. Second, and more seriously, third-party proceedings against plan administrators may bring the state court into collision with congressional policies embodied in ERISA. Indeed, there is potential in ERISA for the complete insulation of retirement plan interests from any and all claims by the non-employee spouse, whether those claims are based on marital property division, or spousal or child support rights, and whether plan interests are sought to be reached in the divorce proceeding itself or in enforcement proceedings.

ERISA and Preemption

ERISA contains provisions that may be construed as preventing some or all state court impingement on the allocation of retirement plan interests on divorce. Every plan governed by the regulatory provisions of ERISA is required by section 1056(d)(1) to "provide that benefits provided under the plan interests through an offsetting award of other property or in money installments.


This barrier to third-party enforcement is a strong incentive for allocating the present value of plan interests makes it impractical or impossible to award sufficient offsetting marital property to

157. See note 156 supra. See also discussion of anti-transfer clauses mandated by ERISA at notes 162-63, 207-12, and accompanying text infra.
plan may not be assigned or alienated.” There is a parallel provision in ERISA's amendments to the Internal Revenue Code (IRC), imposing the same requirement as a condition for tax advantages. Standing alone, these provisions are merely a federally-imposed contract provision and a pre-requisite for favorable tax treatment. ERISA’s section 1144(a), however, provides in addition that the regulatory provisions of ERISA “shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in [ERISA sec. 1003(a)] . . . and not exempt under [ERISA sec. 1003(b)] . . . .”

In several recent cases, courts have considered the extent to which ERISA preempts state divorce laws. State divorce proceedings may impinge on retirement plans in two ways. Either plan interests may be made the subject of a direct award in the course of a proceeding, or a spouse may seek to enforce an award already made by employing garnishment, citation, or other supplementary proceedings against the plan participant or against the plan itself. In either type of proceeding, the plan interests may be characterized under state law as property to be divided or as funds available to satisfy an award of maintenance or child support. There is agreement among the cases that have decided the point that state court enforcement of alimony or child support awards, by garnishment of private plan benefits that are matured and in the hands of plan administrators, is not precluded by ERISA.

Beyond that point, however, the cases have reached conflicting results. In Francis v. United Technologies, a federal district court held that California's community property laws were preempted by ERISA insofar as those laws purport to award a property interest in plan benefits to the non-employee spouse. Because Francis involved a property award, the case is distinguishable from those that have permitted garnishment of plan benefits to enforce alimony or child support awards. To the extent, however, that the Francis holding rests on a finding that Congress intended, in ERISA, to “effect the broadest possible preemption of state law,” the Francis case suggests that an alimony or child support award based on a consideration of the value of plan interests also would be barred, as would enforcement of such an award by garnishment of plan funds.

159. I.R.C. § 401(a)(13).
161. See note 162 infra.
162. See, e.g., Cody v. Biecker, 594 F.2d 314 (2d Cir. 1979) (garnishment of pension funds for support excepted from alienation and assignment provisions of ERISA); American Tel. & Tel. v. Merry, 592 F.2d 118 (2d Cir. 1978) (garnishment order for support excepted). See also M.H. v. J.H., 93 Misc. 2d 1016, 403 N.Y.S.2d 411 (Queens Cty. Fam. Ct. 1978) (allowed payroll deduction for child support); Cogollos v. Cogollos, 93 Misc. 2d 406, 402 N.Y.S.2d 929 (Sup. Ct. 1978) (allowed deduction of order against plan administrators for spousal support obligation). See also cases cited at note 207 infra.
163. 458 F. Supp. 84 (N.D. Cal. 1978).
164. Id. at 86.
165. Id.
In *Stone v. Stone*, the court reached the opposite conclusion with regard to ERISA preemption of California community property awards. The *Stone* court concluded that section 1056(d) of ERISA was not intended to preclude state courts from considering and dividing plan benefits as community property or from enforcing community property awards against the plans themselves, and found no conflict between ERISA's objectives and California's property laws. The *Stone* court reasoned that the interests of a non-employee spouse differ from the interests of other potential claimants who would be affected by section 1056(d) in two ways: (1) ERISA evinces a design to protect the family unit, not merely the participant; and (2) non-employee spouses cannot be protected from economic harms flowing from divorce or the employee spouse's potential refusal to honor marital obligations unless plan benefits can be reached. In the court's view, non-marital claimants are differently situated in that they have only themselves to blame for extending credit to a person whose interest under the benefit plan was beyond their reach.

With regard to the broad preemptive effect of section 1144(a), the *Stone* court found that the provision was not designed to preempt "any state law with even the most tangential relation to ERISA." Having found that the more specific prohibition of section 1056(d) was not preemptive, the court had little difficulty in concluding that section 1144(a) should not be given any greater preemptive effect. The questions involved seem likely to be resolved in the near future, either by the United States Supreme Court or by congressional action.

The uncertainty surrounding these questions was intensified by the recent decision of the United States Supreme Court in *Hisquierdo v. Hisquierdo*. The Court, in a seven-two decision, held that the Railroad Retirement Act (RRA) precluded the application of California's community property laws to Railroad Retirement benefits. The California state courts were barred from enforcing community property awards against RRA benefits as community property, and even from considering such benefits as property in the course of making a compensating award of other property.

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169. Id. at 926-27.
171. 450 F. Supp. at 932.
172. S. 209, 96th Cong., 1st Sess. (1979), would amend ERISA to require an employee pension plan subject to ERISA to comply with a court order to allocate a portion of a pension payment to a divorced spouse for alimony or child support. See N.Y. Times, March 5, 1979, § 1, at 1, col. 2.
175. 439 U.S. at 590-91.
Thus, *Hisquierdo* raises serious questions regarding whether ERISA preempts state divorce courts' allocation of retirement plan interests as property. Because of numerous differences between ERISA and RRA, and because of certain constitutional questions, the outcome is uncertain.

There are substantial arguments in support of the proposition that ERISA should not be found to preempt the treatment of retirement plan interests as property in the course of divorce proceedings. *Hisquierdo* involved a detailed consideration of RRA in terms of the following: its means and purposes; its attention to the delineation of spousal rights; and its scope of preemption and prohibition of transfers. In each of these respects, RRA and ERISA are significantly different.

First, ERISA is a hybrid enactment, embodying both regulatory provisions and separate but substantially identical provisions imposing conditions for obtaining tax advantages. The Act dictates the terms of most private retirement plans, either because they are covered by its regulatory provisions, or as a condition for granting tax advantages. By contrast, RRA is almost identical in structure and operation with the Social Security Act. It rests squarely on the taxing and spending power. It creates an elaborate scheme for accumulating revenue through direct taxation and then disbursing federal funds to annuitants who qualify for retirement benefits under RRA provisions. Thus, ERISA regulates retirement plans; RRA is a retirement plan. ERISA manipulates income tax deductions and deferrals in order to encourage formation of and participation in private retirement plans that amass private wealth.

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176. *Id.* at 586-90.

177. Even if *Hisquierdo* does presage a finding that ERISA explicitly or implicitly pre-empts California community property awards, at least two approaches remain supporting a finding of no preemption with regard to an Illinois award under IMDMA: (1) marital property division under IMDMA may differ sufficiently from community property awards to justify a finding of no preemption; (2) IMDMA awards of marital property in lieu of or in addition to maintenance (see *ILL. REV. STAT.* ch. 40, § 503(c)(9) (1977)), IMDMA maintenance, and IMDMA child support awards may not be preempted because of either differences in the statutory criteria involved and their underlying purpose, or a finding of implicit congressional acquiescence to such awards. For the maintenance criteria of IMDMA, see *ILL. REV. STAT.* ch. 40, § 504 (1977). For a discussion of implied congressional acquiescence, see Wissner v. Wissner, 338 U.S. 655, 660 (1950). *Cf*. *Hisquierdo* v. *Hisquierdo*, 439 U.S. at 587. See also 42 U.S.C. §§ 459, 462 (1976), expressly allowing garnishment of federal benefit programs for spousal and child support. See the critical discussion of some of the problems involved in that distinction in *Stone* v. *Stone*, 450 F. Supp. at 926-31.


180. *Id.*

burses federal funds from the Railroad Retirement Account, an account that has received transfers of Social Security funds, and is expected to receive general tax revenues. ERISA dictates the terms of private contractual obligations and grants a private cause of action for enforcement of those obligations by participants and their beneficiaries. RRA sets up a Railroad Retirement Board to determine entitlement to benefits, and provides only limited review of the Board's decision.

Second, the acts differ in their textual concern for the delineation of spousal rights. ERISA does evince some limited congressional concern for the interaction between ERISA-protected employee rights and the claims of non-employee spouses. ERISA requires that, for plans providing for payment of benefits in the form of an annuity, the plan must provide that payments be made on a joint and survivor basis, that is, in the form of an annuity payable during the joint lives of the employee and his or her spouse. The plan must permit the employee to elect not to receive the annuity as a joint and survivor benefit on reaching normal retirement age and the employee must be able to assure a survivor annuity for his or her spouse if the employee may retire early but declines to do so. ERISA provisions regarding Individual Retirement Accounts (IRA) deal with surviving spouses as measuring lives for distribution. These same IRA provisions also provide for the effectuation and nontaxability of IRA transfers made incident to a divorce, and require that the IRA provisions be "applied without regard to any community property laws."

RRA's spousal provisions are more explicit and far-reaching. The Act states: "The entitlement of a spouse of an individual to an annuity . . . shall end on the last day of the month preceding the month in which (A) the spouse or the individual dies, [or] (B) the spouse and the individual are absolutely divorced . . . ." The Court noted in *Hisquierdo* that this section was adopted after rejection of a proposal that would have granted a divorced spouse a special benefit like that available under the Social Security Act. The above RRA provision was then considered by the Court, together with the preemption and antigarnishment, antianticipation requirements of RRA's section 231m, to reach the conclusion that section 231m was

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187. I.R.C. §§ 408(a), 408(b), 408(d)(6).
188. Id. § 408(g).
190. 439 U.S. at 585.
meant to assure that no RRA funds will be paid to a divorced spouse. \(^{191}\)

Congressional intent of comparable clarity does not emerge from ERISA. The joint and survivor requirements may fairly be regarded as protecting only the entitlement of surviving spouses to a continuation of benefits. There is no mention at all of divorcing or divorced spouses. The IRA provisions assume that an individual retirement account or annuity may be transferred to a spouse as part of a divorce settlement. \(^{192}\) It would be odd to conclude that Congress contemplated that only IRAs, of all the private retirement arrangements regulated by ERISA, could be subjected to state divorce decrees. Moreover, the IRA provisions deal only with the tax treatment of such transfers, and it may be that Congress regarded the tax treatment on divorce of other types of retirement interests as sufficiently well-settled that explicit attention was not warranted. The textual preemption of community property laws by the IRA tax provision \(^{193}\) does indicate that Congress speaks clearly when it wishes to assure preemption of a specific matter. Even here, however, the intent may only have been to assure that IRAs could be created and would be taxed without regard to community property laws.

Third, as to the explicit scope of the RRA and ERISA preemption provisions, again there are notable differences. The preemption of RRA is accomplished by section 231m:

Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . . \(^{194}\)

The comparable ERISA provision is section 1144(a):

[T]he provisions of this [regulatory] sub-chapter and sub-chapter IV of this chapter [Pension Benefit Guaranty Corporation] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . . \(^{195}\)

The RRA provision aims unmistakably to preempt state laws to the extent necessary to prevent all transfers of benefits—some normally voluntary, some normally involuntary. It prevents the transfers and overrides contrary state law in the same breath. The ERISA preemption provision is broad and general, but it does not, even when read with ERISA’s anti-transfer provisions, obviously preempt all state laws regarding involuntary transfers of plan interests. ERISA’s specific anti-transfer provisions are found in two locations. In the regulatory title, section 1056(d)(1) requires each covered plan to “provide that benefits provided under the plan may not be assigned or alien-

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191. Id. at 588-91.
192. See notes 187 & 188 supra.
193. I.R.C. § 408(g).
A parallel provision imposes an identical requirement as a condition of qualification for tax advantages. These provisions, on their face, merely require inclusion of the relevant clause. The sanction for non-compliance is disqualification from tax advantage or possible injunctive action to require the insertion of the clause. Moreover, it is only assignment and alienation that are prohibited. The plain and ordinary meaning of these terms embraces only voluntary transfers. There is no mention of attachment, garnishment, or other types of involuntary transfers. The language of ERISA’s preemption provision is neither limited nor textually linked to the requirements of the antiassignment provision. Preemption extends to all state laws “relating to” retirement plans. When the two provisions are read together, it is not apparent that the antiassignment provision broadly preempts any state laws addressing assignment and alienation other than those that forbid antiassignment or antialienation clauses in retirement plans. In summary, the explicit preemption of RRA is more specific and more clearly related to a prevention of all benefit transfers than is the case for the comparable provisions of ERISA.

With regard to the broad preemption of section 1144(a), it has been observed that a literal application of the provision would result in preemption of state laws that impinge on retirement plans and plan interests in ways that are clearly unrelated to ERISA’s goals and purposes. It is submitted that section 1144(a) was intended only to result in preemption of state laws that are similar to the provisions of ERISA in subject matter and in purpose, and that IMDMA and other state laws relating to property division on divorce are tangential to the subject matter and the purpose of ERISA.

The foregoing discussion demonstrates that there are important differences in the scope and purpose of explicit congressional preemption in the two statutes. Hisquierdo also rests, however, on a discerned implicit preemption. The supersession of California’s community property laws was regarded as flowing in part from a finding that RRA evinced congressional objectives, the accomplishment of which would be frustrated by California law.

The goal of Congress was to assure that RRA funds would be paid only to the annuitant, and the antitransfer provisions protected the accomplishment of that
goal. Do the ERISA antiassignment provisions protect a similar congressional goal whose accomplishment would be frustrated by treating plan interests as property as between divorcing spouses, or by reaching plan benefits in the hands of plan administrators for the purpose of enforcing a division of property? ERISA’s silence with respect to regulation of the rights of divorcing spouses is persuasive evidence that there was no such goal. Because the area of domestic relations is traditionally subject only to state regulation, courts are reluctant to infer congressional preemption in the absence of an unambiguous showing of preemptive intent or frustration of congressional objectives.

It is arguable, however, that implicit preemption may flow from the ERISA antiassignment provisions coupled with the stated objectives of protecting the interests of participants in employee benefit plans and their beneficiaries. This position rests on the assumption that an involuntary transfer of plan interests on divorce is an assignment or alienation. The Act does not define either assignment or alienation, and there is little or no guidance from the legislative history. The context and the ordinary meaning of the terms suggest the interpretation that the intent was to limit only voluntary transfers. A few cases have so held, permitting involuntary garnishment or attachment of plan benefits. If this reading is correct, then the provisions would not protect against the direct and involuntary allocation of benefits on divorce. Moreover, there is doubt whether Congress intended to protect the interests of participants from their spouses. Again, the silence of the Act with regard to spousal rights contrasts strikingly with the detailed protection provided vis-a-vis the participant’s employer.

204. Id. at 583-84.
205. In *Hisquierdo*, the Court stated:
   On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited a review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted [citations omitted]. . . . A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that State law be overridden [citations omitted].


206. The exceptions to the statutory provision are: (1) a voluntary and irrevocable assignment of no more than 10% of matured benefits; and (2) use of benefits as collateral for specified types of loans from plan funds. To say that garnishment is not a voluntary assignment or alienation begs the question of whether it is any sort of assignment or alienation. *Cf. Treas. Reg. § 1.401(a)(13)(d) (1978); H. REP. NO. 93-1280, 93d Cong., 2d Sess. 280; [1979] 1 PENS. PLAN. GUIDE (CCH) ¶ 2533.*

It also is matter for debate whether ERISA's antiassignment provisions preclude consideration of the value of plan interests followed by an indirect or offsetting award of property equal in value to a fraction of the plan interests. In *Hisquierdo*, the Court held that the California courts were precluded from considering the value of RRA benefits in computing the total value of the community property to be divided, with the aim of awarding the non-employee spouse his or her marital share out of other, immediately available community property.208 This form of division had been approved for military benefits in *In re Marriage of Milhan*.209 The Court found, in *Hisquierdo*, that even this limited consideration of RRA benefits was precluded by the Act, as section 231m prohibited “anticipation” of benefit payments.210 The perceived congressional objective underlying the prohibition of anticipation was the protection of the annuitant from deprivation through a later failure to receive benefits. Nonreceipt might result from early death or termination of employment, or from congressional termination of funds.211 Finding a congressional objective that would be frustrated by anticipation, the Court concluded that California laws permitting offsetting property awards were superseded.212

There is no provision in ERISA prohibiting an “anticipation” of benefits. *Hisquierdo* proceeds on a three-step analysis. The language of section 231m is given its literal meaning, which the Court finds to embrace the state’s action. The Court then seeks to ascertain the congressional objective that is protected by the language of the statute. Finally, the question is posed whether the state’s action will frustrate the attainment of the congressional objective.213 Where the anticipation of ERISA benefits is involved, the inquiry may stop at the first step. ERISA does not prohibit anticipation of benefits under state law. It is only “assignment” or “alienation” that is prohibited.214 An offsetting property award made after valuing retirement plan interests as part of the property acquired during the marriage is neither an assignment nor an alienation of plan benefits. In addition, the ERISA provi-

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208. 439 U.S. at 590-91.


211. Id. at 589.

212. Id. at 590-91.

213. Id. at 588-89.

sion, unlike RRA's section 231m, reveals no comparable degree of determination to effect a broad insulation of benefits from any and all types of claims or transfers.

Nonetheless, the relevant Treasury regulation issued under section 1021(c) \(^\text{215}\) expands the meaning of assignment or alienation by requiring that a tax-qualified trust be part of a plan that "provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." \(^\text{216}\) The statutory authority for and therefore the validity of this regulation are questionable, as it goes well beyond the plain language of the statute. It is doubtful whether such a gloss is "necessary or appropriate" to implement ERISA provisions. \(^\text{217}\) The effect of the regulation is to cause the inclusion of a much broader clause in most plans than is plainly required by ERISA. Unless "assignment" or "alienation" means "anticipation," there is no reason to regard such a clause as reflecting a preemptive federal policy. \(^\text{218}\) The \textit{Hisquierdo} reliance on the specific "anticipation" language of section 231m is some evidence that the Supreme Court did not view the terms as synonymous. \(^\text{219}\)

Even if it is assumed that the language of section 1056(d) embraces anticipatory awards, however, the inquiry is not at an end. The discussion of plausible congressional objectives in \textit{Hisquierdo} is properly regarded as a dual inquiry, both to ascertain congressional intent, and also to ascertain whether Congress was acting within the limits of its constitutional powers. The link between prohibition of RRA anticipation and a constitutionally permissible objective was an important issue in \textit{Hisquierdo}. The conclusion of the majority that anticipation awards were properly barred necessarily involved a question of power as well as of intent. The provision was within the powers of Congress because it was found to be rationally related to preventing results that would frustrate valid objectives of RRA. Because RRA is an exercise of the taxing and spending power, the range of permissible objectives and of permissible means for protecting them may well be greater than would be the case for a statute resting on a different grant of power and operating in a different way. \(^\text{220}\) As the majority explicitly noted in


\(^{216}\) \textit{Id}.


\(^{218}\) The Treasury regulation has no authoritative effect beyond mandating the inclusion of a specific clause as a condition for qualifying for tax advantages. The IRS has in fact specifically disclaimed any authority to interpret § 1056(d)(1), the regulatory antiassignment provision, or to define the preemptive effect of § 1144, asserting that it has no authority to issue regulations under title I of ERISA, the regulatory title. See Introductory Material preceding Treas. Reg. § 1.401(a)-13 (1978), reprinted in [1979] \textit{PENS. PLAN. GUIDE} (CCH) ¶ 22,899.

\(^{219}\) 439 U.S. at 585-89.

\(^{220}\) In \textit{Hisquierdo}, the Court stated that the prohibition against anticipation "preserves congressional freedom to amend the Act, and so serves much the same function as the frequently stated understanding that programs \textit{of this nature} convey no future rights and so may be
Hisquierdo, the result might well be different if a statute like ERISA were the statute in question. In an important note, the Court stated:

In this case, Congress has granted a separate spouse's benefit, and has terminated that benefit upon absolute divorce. Different considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates. See Employee Retirement Income Security Act of 1974 [citing ERISA]. Our holding intimates no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics. This characterization of ERISA may imply a recognition that RRA rests, in contrast to ERISA, on the taxing and spending power and thus enjoys the greater latitude of permissible means and objectives that accompanies that grant of power. The Court also recognized, as noted above, ERISA's relative silence as to any design to delineate or even affect the interests of spouses on divorce.

In summary, although it is clear that Congress intended in ERISA to give substantial protection to an employee vis-a-vis the employer, there is not comparable clarity of intent to insulate the employee from spousal claims. Certainly, such intent emerges from ERISA much less clearly than from RRA. The structure and text of ERISA's preemption and antitransfer provisions are not obviously intended to extend so far. Absent an unambiguous congressional declaration, the Court may well find that considerations of federalism preclude a finding of preemption of state domestic relations laws. ERISA's regulatory purpose and the particular powers exercised also may provide less latitude for an inference of intent to intrude so deeply into the field of domestic relations. With regard to "anticipatory" or offsetting property awards, the language of the relevant ERISA provision is markedly different without taking property in violation of the Fifth Amendment [citations omitted]." Id. at 589-90 (emphasis added).


221. 439 U.S. at 590 n.24. The Court of Appeals for the Second Circuit has stated, speaking of footnote 24:

We read this footnote as casting no doubt on our conclusion that those seeking enforcement of family support orders may garnish benefits regulated by ERISA, but rather as perhaps opening the door to greater rights for spouses of pensioners covered by ERISA. In other words, we think the footnote kept the question open whether one may enforce the kind of community property right in the expectation of retirement benefits held preempted in Hisquierdo against pension benefits regulated by ERISA.

Cody v. Riecker, 594 F.2d 314, 317 (2d Cir. 1979) (emphasis added).

ent from the RRA provision. Finally, the permissible scope of congressional power to prohibit involuntary transfers and anticipatory awards may be narrower where the statute "merely regulates" private plans than is the case where the statute is designed to control the disposition of federal funds.

It has also been suggested that an exercise of congressional power which deprives a non-employee spouse of an interest that state courts would recognize as property would work a taking of property in violation of the fifth amendment.223 This argument appears not to have been raised in Hisquierdo. In the RRA context, it is a dubious position because of the characterization of RRA benefits as federal funds disbursed through a statutory program which, the majority insisted, created no contractual entitlement.224 The same factors are not involved in the operation of ERISA. In fact, ERISA has exactly the opposite thrust. It mandates extensive contractual provisions and creates a civil cause of action to assure their enforceability. ERISA preemption of spousal property awards would thus place the courts in the ironic position of refusing to permit division of interests whose character as property under state law might be largely the result of compliance with the ERISA's provisions. It is an open question whether Congress may, through an exercise of regulatory power, preclude state recognition of private property rights. Decisions that have approved the preemption of state property laws have not involved the exercise of federal regulatory power.225

The statutes in those cases were assertions of direct congressional power over federally-owned property,226 over federal funds,227 or over the property of recipients of federal benefits.228 May Congress employ the commerce power and its power to control the modes and timing of income taxation to preclude state recognition of property rights created by private

223. See Reppy, supra note 205, at 487-92, 505-07. Reppy also suggests that a remedy under federal common law must be permitted to compensate a spouse whose property was "taken" as a result of a finding of federal preemption of state property laws. Cf. Miree v. DeKalb County, 433 U.S. 25, 34-35 (1977) (Burger, J., concurring) (State law governs whether plaintiffs can recover as third party beneficiaries to grant contracts between the defendant and the Federal Aviation Administration because no rights, interests, liabilities, or duties of the government hinged on the litigation. Burger suggested that such a rule might not be applied. He felt that a remedy should be available under federal common law where needed to decide a controversy related to established government programs.).

224. 439 U.S. at 582-83.

225. See note 226 infra.

226. In McCune v. Essig, 199 U.S. 382 (1905), the Court held that federal law controlled the title to public land where the United States was the grantor.


228. See United States v. Oregon, 366 U.S. 643 (1961) (state law superseded by federal requirement that personal property of veteran dying in veterans' hospital without will or legal heirs passes to United States). The principle of the case has potential for expansion. Id. at
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contract where no federal funds or property are involved? It may be that preemption under such circumstances is a taking of property without just compensation.

CONCLUSION

The Illinois Marriage and Dissolution of Marriage Act has given courts hearing divorce matters the mandate to make a “just” division of all marital property. The new statute also restricts the availability of alimony (now maintenance) on divorce. The focus of economic controversies in dissolution proceedings is likely to turn increasingly from a struggle over maintenance to a struggle over property.

For many families that are undergoing divorce, the most substantial and important disputed asset will be the interests in pension or retirement benefits that have been acquired by one or both parties. It will be necessary for Illinois courts in making a just division of marital property to decide under what circumstances such interests are “property.” As to those interests found to be property, it also must be determined whether they are marital or non-marital property. This involves a determination of the time when the property was “acquired.”

Most private pension and retirement plans now are regulated by the Employees’ Retirement Income Security Act (ERISA). Plans complying with ERISA guarantee that an employee’s plan interests will move through three broad stages over time of employment: (1) They initially will “accrue” or be measured as they are earned either by specified contributions, in the case of defined contribution or by specified future benefits, in the case of defined benefit plans; (2) the accrued or earned benefits later will vest or become nonforfeitable although deferred in enjoyment; and (3) the vested benefits eventually will become mature or immediately payable either on retirement or on request.

It is submitted that Illinois courts should include as property for purposes of marital property division all those benefits, even though not yet matured or vested, that are accrued or have been “earned” under the terms of the individual plan. Most courts that have considered the issue have so held. Policy reasons can be articulated to support this approach. Among them are the unique long-term supervisory powers of divorce courts, and the unique characteristics and economic importance of plan interests. With regard to the time of acquisition, it is suggested that benefits should be viewed as acquired when they accrue or are earned under the terms of the plan.

The problems associated with valuation of benefits are substantial. A number of approaches have been suggested, including the proposal that the

653-54 (Douglas, J., dissenting). Nonetheless, the relevant statute cannot be characterized as merely regulatory. Every veteran affected by it was the recipient of veterans’ benefits. Moreover, the purpose of the statute has been held to be “to supply greatly needed funds for the General Post Fund, which provides recreation and other forms of enjoyment to ex-service men and women confined to veterans’ homes and hospitals.” New York v. United States, 574 F.2d 128, 131 (2d Cir. 1978) (in re Levy).
courts borrow valuation methods embodied in ERISA itself. It is urged that qualified actuaries should be employed as experts to aid in the process of valuation and in the interpretation of complex plan terms.

Three approaches to allocation are possible. The immediate division of the present value of the plan interests is most desirable but is often not practical for nonmature interests. An immediate award of offsetting property of the same value is a viable method when present value can be well-estimated. Where precise or reliable present valuation is not possible, a wait-and-see award with fractional allocation is suggested.

Finally, the threat of congressional preemption is important to evaluate. It is noted that ERISA's restriction on assignment and alienation may be broadly or narrowly construed, and emphasis is placed on the sensitive issues raised by congressional regulatory intrusion into the field of domestic relations. It is suggested that ERISA should not be interpreted to deny a non-employee spouse access to a fund which, in many cases, will be the principal repository of marital assets.